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MANSLAUGHTER AND CORPORATE LIABILITY

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INTRODUCTION

The phenomenon of corporate crime has been of ever-increasing concern to academics, legislatures and the judiciary throughout the twentieth century. It has been defined by Clinard and Quinney as "the offenses committed by corporate officials for their corporation and the offenses of the corporation itself"[1], although arguably corporations are also liable for the offences their agents commit outside the scope of their employment or authority which are facilitated by the corporation's organisational negligence[2]. While many corporate crimes occur solely in the financial realm, the law must consider the liability of the corporation - which is considered a 'person' - for acts and omissions which cause harm to or the death of, for example, its employees or consumers.

This paper is concerned with the topical subject of corporate manslaughter; despite a cursory dismissal from the authors of one textbook within the last five years[3], this area of the law has since seen its first conviction, numerous academic articles and the publication of a Law Commission Report[4] which evidenced a "concern, almost amounting to a preoccupation"[5] with this particular facet of manslaughter.

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[1] Clinard, M. and Quinney, R. *Criminal Behaviour Systems: A Typology* (New York: Holt, Rinehart & Winston, 1973)

[2] Colvin, Eric 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* (1) 1-44, 28

[3] "No doubt this is one of the many topics which call for systematic research and consideration but it is one of the least urgent" - Card, R., Cross, R., and Jones, P. *Criminal Law* (London, Dublin, Edinburgh: Butterworths, 1992), p170

[4] Law Commission Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter* (London: HMSO, 1996)

[5] Wells, Celia 'The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] *Criminal Law Review* 545-553, 545

In this Introduction, it is hoped to explain the sudden flurry of activity in relation to corporate manslaughter which is perhaps most evident in the intensity of the Law Commission's attention. Celia Wells notes the significance of the common reaction which her use of the phrase 'corporate manslaughter' elicits from those with no legal background - "like Zeebrugge you mean"[6] - and believes that "[t]he trend towards responding to disasters in terms of corporate manslaughter seems to have begun with the capsize of the *Herald of Free Enterprise* at Zeebrugge in 1987"[7]. The spate of high-profile disasters including the capsize of the *Herald,* the Piper Alpha oil rig explosion, and the King's Cross Underground fire has focused the attention of both academics and the mainstream media on the potential culpability of the organisations responsible for safety in each of those situations. Peter Young claims that:

> "[m]ost disasters occur through an apparently simple fault in an unsophisticated part of a system. That fault, however, is usually symptomatic of greater deficiencies: lack of corporate responsibility for safety, sheer incompetence, the absence of clear definitions of accountability"[8].

C.M.V. Clarkson asserts that "[i]nterest in [corporate criminal liability] is the result of two sets of developments"[9], the first of which is the series of disasters mentioned above, and the second of which is "an increased awareness of the numbers of persons annually being killed and seriously injured in their places of work"[10]. What these two factors have in common is that the cause of these deaths is increasingly attributed to those in positions of corporate responsibility or the body corporate itself. A change in attitude must be reflected in the

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[6] Wells, Celia 'Cry in the Dark: Corporate Manslaughter and Cultural Meaning' in *Frontiers of Criminality* Loveland,Ian (ed.) (London: Sweet & Maxwell, 1995) 109-125, 109
[7] *ibid* p112
[8] Young, Peter *Disasters: Focusing on Management Responsibility* (London: Herald Families Association, 1993) p1
[9] Clarkson, C.M.V. 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557-572, 557
[10] *ibid* p558

language applied to such situations. Where criminal culpability rests with a corporation, then a death is not an 'accident' but a crime. Large scale disasters are not necessarily 'acts of God' - James Tye, the director-general of the British Safety Council astutely says that "[i]t is no use putting accidents down to acts of God. Why does God always pick on badly managed places with sloppy practices? He does not seem to pick on well managed places"[11].

More than any other single event, the *Herald* capsize and the findings of the subsequent inquiry pointed to a moral culpability on the part of Townsend Car Ferries Ltd. (later P&O European Ferries Ltd.) which was completely unreflected in the abortive attempts to pin criminal responsibility on the company. The circumstances must be outlined.

The *Herald* left the port of Zeebrugge on 6 March 1987 with its bow doors open. Just outside the harbour, the ferry capsized, resulting in the loss of 193 lives. The task of ensuring the doors were shut fell to the Assistant Bosun, who was asleep in his cabin; the Chief Officer failed in his duty to supervise the Assistant Bosun in this; the Master was responsible for the ship setting sail with the doors open. There was no way in which the Captain could tell from the bridge whether or not the doors had been closed. Some degree of fault was also attributed to the Senior Master, for the lack of a fail-safe system in this regard. The official inquiry into the capsize saw blame attached not only to these immediate causes of the tragedy; instead, the Report damningly stated that "a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: what orders should be

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[11] Quoted in 'The Consumer, the Lawyer and the Company', Rodger Pannone, paper presented at Consumer Congress 16th Annual Conference, Belfast, 6 April 1991

given for the safety of our ships? The directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the *Herald* ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness ... The failure on the part of shore management to give proper and clear directions was a contributory cause of the disaster"[12]. It was alleged that the directors ignored requests to install indicator lights to alert crew members to the possibility of sailing with the bow doors open.

An inquest into the deaths of 188 of the *Herald*'s victims took place in September 1987 under Kent coroner Richard Sturt. Explaining the possibility of a verdict of unlawful killing, Sturt told the jury that they must "be satisfied beyond any reasonable doubt that the act or omission by an individual caused, subsequently, one or more of the deaths and that the individual was guilty of gross negligence"[13]. The coroner found that a corporate body could not, as a matter of law, be guilty of manslaughter, that the aggregation of acts and omissions of individual corporate agents could not be used to find fault in the corporation itself, and that the acts and omissions of Townsend Car Ferries Ltd. were not the direct cause of the deaths[14]. As Celia Wells notes, there is an essential contradiction here in the way "[i]nquest juries are told both that they are not concerned with criminal liability and that they are to reach a conclusion about

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[12] Department of Transport, Public Inquiry, Report of Ct. No. 8074, para. 14.1, p14 (London: HMSO, 1987)

[13] *Quoted in* Crainer, Stuart *Zeebrugge: Learning from Disaster* (London: Herald Charitable Trust, 1993) See *R v. West London Coroner, ex. p. Gray* [1987] 2 WLR 1020

[14] Keenan, Denis 'Corporate Manslaughter' (1988) 102(1140) *Accountancy* 108

how the deceased came to die"[15]. An application for leave to apply for judicial review of the coroner's findings was rejected, but the Court tentatively accepted the possibility of a corporate manslaughter conviction[16]. Despite the cautious approach of the coroner, the jury was evidently convinced on the criminal standard of proof, and brought in a verdict of unlawful killing. As a result, the Director of Public Prosecutions ordered a criminal investigation into the capsize. In June of 1989, manslaughter summonses were issued against P&O European Ferries (Dover) and seven of its employees.

Academic reaction was a cautious welcome - the prosecution of a corporation, and the accompanying shift in public perception away from the stereotypes of 'traditional' crime, was well received, but the limitations of corporate criminal liability detailed below in Chapters Three and Four presented obvious problems. Additional concern was voiced because "[i]t has been clear since the inquest into the drownings, that the relatives were keen to see the company properly punished but not the particular individuals whose misfortune it was to be operating the ferry that March night. The prosecution of a number of individuals at all levels might distract from a consideration of the proper basis of corporate liability for criminal offences"[17].

After 27 days, the case collapsed, Turner J directing the jury to find the company and the five most senior employees charged not guilty. The prosecution promptly dropped its charges against the two remaining defendants, a decision which accorded with the wishes of the relatives not to see junior employees scapegoated when greater fault was present throughout the corporation. A week before the end of the trial the judge ruled that there was "no evidence that

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[15] Wells, Celia 'Inquests, Inquiries and Indictments: The Official Reception of Death by Disaster' (1991) 11 *Legal Studies* 71-84,76

[16] *H.M. Coroner for East Kent ex parte Spooner* (1989) 88 Cr. App. R. 10

[17] Wells, Celia 'Manslaughter and Corporate Crime' (1989) 139 *New Law Journal* 931-934, 931

reasonably prudent marine superintendents, chief superintendents, or naval architects, would or should have recognised that the system gave rise to an obvious and serious risk of open-door sailing"[18]. The main reason for this finding was evidence that ships had sailed safely using the system in question over 60000 times, for over seven years. But as Wells notes "an approach to risk assessment based only on frequency of past occurrence is simplistic. It is reminiscent of the small child who, having survived crossing a road without looking, disputes the risk involved in such a strategy with the statement 'But it was safe: I didn't get run over'"[19].

The very failures of communication which had resulted in the drownings allowed the company to escape liability. The Crown contested that because of five previous incidents in which ferries had sailed with the doors open, the system operating was obviously inadequate, and the shore management should have known this. And yet because four of the five incidents were not brought to the attention of any of the defendants (the fifth, seen by one of them, was immediately dealt with[20]), the company could not be fixed with responsibility for failure to amend its procedures. The derivative nature of corporate criminal liability, which is parasitic on proof of individual criminal liability, is starkly discredited by the facts of the *P&O* case.

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[18] *supra* n13 p101

[19] Wells, Celia 'Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551-566, 554. The risk which should have been considered, however, was the risk of *harm*, not of sailing with open doors.

[20] Bergman, David 'Recklessness in the Boardroom' (1990) *New Law Journal* 1496

WORKPLACE FATALITIES

Between 1983 and 1992/93, there were 5774 reported cases of employees, self-employed people and members of the public killed in workplace incidents[21]. David Bergman believes that "[m]ost of these deaths are unnecessary and easily preventable. According to the Health and Safety Executive (HSE) over 70% of workplace deaths are the fault of management and their failure to organise and co-ordinate safe systems of work, to inform workers of hazards, and provide them with proper training and instruction"[22].

The investigation of workplace deaths falls to the HSE, which is concerned with violations of the Health and Safety at Work etc. Act (HSWA) 1974. It claims that suitable cases for prosecution of such crimes as manslaughter will be referred to the police, but as Gary Slapper noted in 1992, "[s]ince 1974, when the HSE was established, there have been 9050 deaths at work yet the HSE cannot point to a single case which it has referred to the CPS"[23]. Prosecutions are for failure to comply with a duty set out in the Act[24] - the seriousness of the consequences is irrelevant to the issue of guilt. Therefore, regulatory offences under the 1974 Act are generally punished with fines which can be insignificant in relation to the size of the company convicted[25]. No offence under the 1974 Act is triable only on indictment, and so it is left "to the discretion of the magistrate to decide whether

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[21] Health and Safety Commission *Annual Report 1992/93* (London: HMSO, 1993) It is estimated that a mere one-sixth of workplace 'accidents' are reported to the authorities, although for 1993/94, there were 28,924 serious injuries due to violent incidents reported - Health and Safety Commission *Annual Report 1993/94* (London: HMSO, 1994)

[22] Bergman, David *Deaths At Work: Accidents or Corporate Crime* (London: Workers' Educational Association, 1991) p3

[23] Slapper, Gary 'Crime Without Conviction' (1992) *New Law Journal* 192-193, 192

[24] General duties in respect of the health and safety of employees and others are set out in s2 and s3 respectively. For each, the maximum penalty is an unlimited fine (£20,000 on summary conviction): HSWA Act 1974, s33(1A) (as amended by the Offshore Safety Act 1992)

[25] Bergman, David *The Perfect Crime?: How Companies Escape Manslaughter Prosecution* (London: Workers' Educational Association, 1994) p102

or not the case should be prosecuted in the Crown Court"[26], even where a death has occurred. The maximum fine in the magistrates' courts is £20,000.

Bergman notes that, traditionally, "police investigation signifies the first step in defining certain activity as criminal"[27]. In contrast to traditional violent crime, however, "crimes of corporate violence rarely attract any investigation at all. In the few instances where investigations do occur, they will be carried out by a non-police inspectorate (e.g. the HSE) chiefly concerned with regulation"[28]. As well as the problem of insufficient resources faced by regulatory agencies, Bergman contends that "[t]he lack of police investigation allows inspecting agencies to undertake less thorough investigations, and magistrates and judges to sentence more leniently. The displacement of the police is therefore both a real and symbolic first step in the decriminalisation of corporate conduct and its marginalisation from effective sanction through the criminal justice system"[29]. Wells, too, argues for deaths at work to be subject to full police investigation, noting that:

> "[i]t is the very existence of separate agencies which contributes to the marginalisation of these deaths and injuries from the glare of criminal enforcement ... Industry crime is not brought within the current definitions of crime (murder, manslaughter and so on) and where specific offences are drawn, such as pollution and health and safety laws, they are policed separately and set apart from 'ordinary' crime by their own system of regulation"[30].

Attitudes to corporate crime in the workplace may, however, be changing - the first company director to be disqualified as a result of an offence under health and safety law lost his position in June 1992. Rodney Chapman was prosecuted

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[26] *ibid* p103
[27] Bergman, David *Disasters - Where the Law Fails: A New Agenda for Dealing with Corporate Violence* (London: Herald Families Association, 1993) p43
[28] *ibid* p43
[29] *ibid* p47
[30] Wells, Celia 'The Decline and Rise of English Murder' [1988] *Criminal Law Review* 788

under s37 of the HSWA 1974 as the director of a company which, with his consent, connivance or due to his negligence, contravened a prohibition notice[31]. This may signal a welcome new focus on the individual responsibility of senior management, but as with the *P&O* case above, there are larger issues of corporate fault than such an approach can accommodate. For this reason, too, this paper examines the possibility of reform in the area of corporate manslaughter.

Chapter One raises the question of whether the prosecution and punishment of a corporation can be justified philosophically - what is it that we seek to accomplish by doing so? The justifications for the punishment of individuals are therefore examined, and in the latter part of the chapter, applied to the corporate context. The following two chapters are devoted to exposition of the important background information which underlies consideration of corporate manslaughter. Chapter Two explains the development of the law of manslaughter as it applies to all persons, natural or corporate; Chapter Three deals with the evolution of principles of corporate liability for crime generally, and manslaughter in particular.

From this point, the focus switches to the potential for improvement of the current system of liability laid out in the previous chapters - Chapter Four looks at some of the alternative schemes of liability which have emerged in the academic literature on the topic, and is followed in Chapter Five by an exploration of the approaches adopted in several other jurisdictions to see what lessons can be learnt from the use of alternative schemes in practice. The concern of Chapter Six is with the problem of effective punishment of corporations; again, the possibility of broadening the range of sanctions available to improve the productiveness of corporate punishment is that chapter's main consideration.

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[31] Slapper, Gary 'Where the Buck Stops' (1992) *New Law Journal* 1037-1038, 1037

Finally, Chapter Seven provides an explanation and discussion of the Law Commission's recent proposals for a new crime of corporate killing.

As our attitude to 'accident' and 'disaster' changes, and the concepts of risk and blame increase in significance to our perception of corporate activity, the law must adapt as well. This paper considers the most effective and accurate way in which the law can reflect the culpability of corporations for unlawfully causing death.

CHAPTER ONE: THE PHILOSOPHY OF CORPORATE PUNISHMENT

Before launching into an examination of the law of corporate manslaughter, it is necessary to test the solidity of the philosophical foundation on which that law is based. The question in issue is simple - is the criminal law an appropriate system for dealing with the misdemeanours of corporate actors? This chapter provides first an extensive examination of the justifications which are advanced for punishment generally, and then seeks to apply those justifications, if possible, to the corporate context.

JUSTIFICATIONS OF PUNISHMENT

Michael Lessnoff notes that "[h]istorically, two major, and conflicting, justifications for punishment have been suggested - the retributive theory and the utilitarian theory"[1]. The utilitarian justification subdivides to include the benefits of deterrence, incapacitation and rehabilitation; the respective importance placed on each of these varies with the prevailing philosophy of the criminal justice system, but all play some part in the justification of punishment.

Retribution revolves around the notion that the criminal is punished *because she has done wrong* - the punishment is deserved and is an end in itself. The opposing view is that punishment is justified only in its promotion of the greater good. This may suggest a consequentialist determination to achieve a goal at any price, giving rise to definite moral problems; "if it is the desirable consequences of punishment that justify it, and not the fact that the victim has committed a wrong act, why not, on appropriate occasions, punish an innocent man, pretending that

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[1] Lessnoff, Michael 'Two Justifications of Punishment' (1971) 21 *Philosophical Quarterly* 141-148, 141

he is guilty, if the desirable consequences can be brought about thereby?"[2]. However, the retributive and utilitarian theories may be employed together - in this way, punishment is imposed *because* of its utilitarian benefits, and in an *amount* dependent on the desert of the criminal being punished. Therefore, by limiting punishment to the maximum deserved, such a dilemma is circumnavigated.

RETRIBUTION

The part played in punishment by notions of retribution is repugnant to many liberals, but nonetheless cannot be ignored. It can be seen in the retaliatory sentiment of the earliest known system of laws, the Code of Hammurabi, which had as its ruling principle the *lex talionis* - an eye for an eye, a tooth for a tooth[3] - although unlike retaliation, retribution involves the concept of fault. It is embedded deeply in human psychology; William Mc Dougal claims that it "arises naturally from the doctrine of free will ... according to this assumption, where human action is concerned, the future course of events is not determined by the present". Therefore, "punishment cannot be administered in the forward-looking attitude with a view to deterrence or to moral improvement, but only in the backward-looking vengeful attitude of retribution"[4]. Such thinking has given rise to the idea that perhaps "as a society we are not yet prepared to abandon the retributionary element in criminal justice and that, if sentences are thought to be derisible, something akin to lynch law may arise. Courts may, therefore have a therapeutic duty for the present to appease the retributionary instinct in man until we are ready to discard it"[5].

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[2] *ibid* p142
[3] Gibbons, Don C. *Society, Crime and Criminal Behaviour* (Eaglewood Cliffs, NJ: Prentice Hall, 1992) p463
[4] McDougal, William *Social Psychology* (Methuen, 1908) p11
[5] James, Leslie 'In Search of Justice: Retribution or Deterrence?' (1992) *Justice of the Peace* 488-489, 488

Obviously, such a theory flies in the face of the utilitarian philosophy underpinning the justification of punishment for reasons of deterrence, incapacitation or rehabilitation. Kleinig notes that "in many contemporary discussions of punishment, there has been a tendency to regard [non-utilitarian considerations] as impulses or feelings belonging to our lower, non-rational nature, primitive desires for revenge"[6]. That may indeed be so; but a criminal justice system that willingly blindfolds itself to undesirable non-rational elements in the human psyche risks greater danger than one which acknowledges such factors. It is necessary to account for a desire for retribution which, whether welcome or not, can always be understood.

Several elements are included in the concept of retribution - a degree of revenge, as noted above; an old-fashioned, religiously founded idea of expiation[7], whereby the offender is purified of his guilt by the punishment; and also the dominant element of just desert for the crime committed. Von Hirsch sets out the philosophy of just deserts as follows -

> "A useful place to begin is with Kant's explanation of deserved punishment, which he based on the idea of fair dealing among free individuals. To realise their own freedom, he contended, members of society have the reciprocal obligation to limit their behaviour so as not to interfere with the freedom of others. When someone infringes another's rights, he gains an unfair advantage over all others in the society - since he has failed to constrain his own behaviour while benefiting from other persons' forbearance from interfering with his rights. The punishment - by imposing a counterbalancing disadvantage on the violator - restores the

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[6] Kleinig, John *Punishment and Desert* (The Hague, Martinus Nijhoff, 1973) p49

[7] *See* Clarkson, C.M.V. and Keating, H.M. *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 1994) pp. 25-26

> equilibrium: after having undergone the punishment, the violator ceases to be at an advantage over his non-violating fellows"[8].

Since Kant, desert theorists have claimed that by punishing wrongdoers for breaking the law, we accord them "respect as autonomous and responsible human beings who have chosen to commit a crime"[9]. On the other hand, "to be punished for reform reasons is to be treated like a dog"[10].

Just deserts theory has come under some criticism for a supposedly unrealistic understanding of the concepts of "burden" and "freedom". Casting doubt on the self-restraint truly required to avoid committing, for example, murder, Braithwaite and Pettit allege that "some burdens have practical significance for people and some do not"[11]. Therefore, they claim, the renunciation of these "burdens" is insufficient reason for the imposition of criminal liability. What this line of argument fails to recognise is that the less significant a burden is, the more deserving of punishment is he who fails to observe it. The temptation to drop an empty wrapper when no bin is in sight may be great, and the individual act may appear to do no real harm; it is for this reason a significant burden *not* to litter in this case, requiring remembrance of a social contract and the potential result should *everyone* decide that their one little wrapper couldn't cause much of a problem.

Clarkson and Keating conclude that just deserts theory has two main advantages as a justification for retributive punishment. Firstly, state power is subject to limits which prevent the imposition of excessive sentences for exemplary or

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[8] Von Hirsch, Andrew *Doing Justice - The Choice of Punishments (Report of the Committee for the Study of Incarceration)* (1976) p49. See also Murphy, Jeffrie *Retribution, Justice and Therapy* (Dodrecht, London: Reidel, 1979)

[9] *supra* n7, p27

[10] Mabbott, J. 'Freewill and Punishment' (1956) *Contemporary British Philosophy* 289, 303

[11] Braithwaite, John & Pettit, Philip *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) p159

incapacitative reasons - a notion supported by C.S. Lewis, who claimed that "the concept of Desert is the only connecting link between punishment and justice"[12]. The second major advantage of just deserts punishment is the creation of a level sentencing structure, where a crime merits a certain punishment irrespective of the race, religion, nationality or background of the criminal in question[13].

Before leaving the topic of retribution, attention should be drawn to the importance of censure to the criminal system - Clarkson and Keating[14] use the example of the *Sutcliffe*[15] trial, at which the defendant's plea of guilty to manslaughter was acceptable to the prosecution but rejected by the judge, who insisted on an expensive public trial which resulted in a murder conviction. The same sentence of life imprisonment could have been imposed as a result of a manslaughter conviction, but the publicity and stigma of a murder conviction were obviously deemed to be both desirable and necessary for the criminal process to have dealt adequately with this offender. This is important evidence in favour of the contention that "[p]unishment declares that this society will not tolerate this conduct, regardless of any future deterrent effect ... The most important aim of the denunciatory theory ... is to reassure the majority of society that the system does work"[16]. Lawton L.J. in *Sargent*[17] strongly appealed for an understanding that "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it"[18].

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[12] Lewis, C.S. 'The Humanitarian Theory of Punishment' (1953) VI *Res Judicatae* 224
[13] *Supra* n7, p32
[14] *ibid*
[15] *The Times*, April 30, 1981: *The Times*, May 23, 1981
[16] Rychlak, Ronald J. 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment' (1990-91) 65 *Tulane Law Review* 299, 331-332
[17] (1975) 60 Cr App R 74
[18] *ibid* p77

DETERRENCE

Deterrence splits into two categories - individual deterrence, whereby the criminal's tendency to criminal acts is overborne by the fear of punishment; and general deterrence, which lets the punishment of one be a warning to all. Punishment, according to Hobbes' definition is "an Evill inflicted by publique Authority on him that hath done, ommitted that which is judged by the same Authority to be a Transgression of the Law; to the end that the will of men may the better be disposed to obedience"[19]. Montaigne, too, favours general deterrence and dismisses retribution as a justification for punishment, noting that

> "[i]t is a custom of our justice to punish some as a warning to others. For to punish them for *having done* wrong would, as Plato says, be stupid: what is done cannot be undone. The intention is to stop them from repeating the same mistake or to make others avoid their error. We do not improve the man we hang: we improve others by him"[20].

Montaigne's focus on the crime as a "mistake" or "error" displays the irreconcilability of his view with that of Kant, for whom the crime must be a rational human choice, or we deprive humanity of autonomy. This is the first problem with deterrence as a justification for punishment - the fact that human beings, irrespective of our wishes, are not wholly rational creatures. As mentioned in the consideration of revenge as an aspect of retribution, it may on occasion be a necessary function of the law to "encourage the imposition of public vengeance as a substitute for private vengeance"[21]. The efficacy of deterrence is also problematic - the persuasiveness of the deterrence argument is weakened by every crime committed; considerably so, in the case of every repeat offence[22].

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[19] Hobbes, T. *Leviathan*, Everyman edn. (London: J.M. Dent, 1914), p164
[20] Montaigne, Michel de 'On the Art of Conversation' *The Complete Works of Montaigne* (London: Hamish Hamilton, 1958)
[21] Stannard, Dr. John E. (Queen's University, Belfast) *Punishment and Public Relations* Unpublished
[22] *supra* n7, p35

The case for deterrence as a justification for punishment is put forward by Hyman Gross as follows:

> "the rules of conduct laid down in the criminal law are a powerful social force upon which society is dependent for its very existence, and *there is punishment for violation of these rules in order to prevent the dissipation of their power that would result if they were violated with impunity*"[23].

That dissipation of power can be illustrated quite dramatically. Clarkson and Keating use the example of what they call "petty white-collar crime"[24] in the workplace - using an office telephone for private phone calls beyond those permitted by an employer could result in up to five years' imprisonment[25], but the lack of enforcement of this law has led to a breakdown in the understanding of such an act as criminal. Office workers see no practical effect of the commission of this 'forbidden' act, and so no longer consider it forbidden. Without the educative deterrence of an unpleasant consequence (to oneself or another) the act loses its wrongful quality.

This educative role, some claim, goes further than simply preventing citizens from engaging in criminal acts for fear of being caught and punished. "The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime". More than this, "[t]o the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence. For these apply in cases, where a person need not

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[23] Gross, Hyman *A Theory of Criminal Justice* (New York: Oxford University Press, 1979) p401 (emphasis added)
[24] *supra* n7, p40
[25] Theft Act (NI) 1969 s13

fear detection and punishment, and they can apply without the person even having knowledge of the legal prohibition"[26].

From the White Paper which preceded the Criminal Justice Act 1991, it emerges clearly that deterrence is not looked upon as the most important justification for punishment in the current criminal justice system. It was said therein that it is "unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation"[27]. This may be the case, but it ignores the possibility, outlined above, of conscious *and unconscious* inhibitions playing a role in the decision-making of a potential criminal. Deterrence is therefore not necessarily at the forefront of punishment justification, but its part may be significant, particularly in tandem with one or more of the other proposed justifications.

INCAPACITATION

One utilitarian benefit which accrues from punishment is that of incapacitation - prevention, for a time, of the possibility of the offender repeating his crime. This is arguably justified because, in the words of Lawton L.J., "there are some offenders for whom neither deterrence nor rehabilitation works. They will go on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such persons should be locked up for a long period"[28]. Immediately, however, grave ethical problems arise. How can it be predicted with accuracy that a criminal will reoffend? Von Hirsch claims that incapacitation is incompatible with the desert model of punishment because "[t]he use of predictions, accurate or not, [means] that those identified as future

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[26] Andenaes, J. 'General Prevention' (1952) *Journal of Criminal Law, Criminology & Police Science* 176, 179-181

[27] *Crime, Justice and Protecting the Public* (1990) Cm.965, para.2.8

[28] *supra* n17, pp77-78

recidivists [will] be treated more severely than those not so identified, not because of differences in the blameworthiness of their past conduct, but because of crimes they supposedly would commit in future"[29].

Two principles were used in the Floud Report on Dangerous Offenders[30] to assess the problem of punishment on grounds of predicted recidivism. The first is that of just redistribution of risk[31] - the risk of harm should the criminal reoffend must be weighed against the risk of imposing an incapacitative sentence which is not, in fact, required. The second principle is the right of citizens in a free society to be presumed free of harmful intentions[32].

The first of these is a classic utilitarian balancing of risks; the second sees the right of the individual as a trump. Hence the topic of prevention as a justification for punishment is, as are so many dilemmas of morality, a straightforward rights-versus-utilitarianism debate. The Floud Report proposed a statutory framework for protective sentencing, with certain restrictions limiting the eligibility of offenders for such sentences. The restrictions included the requirements that such a sentence should be imposed only in the face of a risk of 'grave harm' from the offender, in a situation where there is no other possible way of providing the public with the necessary protection from that harm.

An accommodation between protective sentencing and principles of retribution has been sought; Ashworth notes that "[i]n general, ... persistent offenders are more blameworthy because they have lost all trace of mitigating circumstances - they know the law only too well, they know what they can expect if caught

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[29] Von Hirsch, Andrew *Past or Future Crimes* (1985), p11
[30] Floud, Jean & Young, Warren *Dangerousness and Criminal Justice* (London: Heinemann, 1981)
[31] *ibid* p49
[32] *ibid* p44

offending, and it is no isolated lapse"[33]. Proportionality, however, remains central to fair sentencing, and the repetition of a petty offence does not justify the imposition of a type of sentence which would have been inappropriate on the first occasion. Clarkson and Keating claim that literature on the subject of prediction "is in broad agreement that for every three persons predicted to commit violent offences, only one will do so"[34]. They conclude that the utilitarian argument "fails to convince those who believe that punishment should be based upon retributive principles ... [and therefore] the search to defend protective sentencing on desert grounds continues to be the only way forward"[35].

REHABILITATION

Deterrence operates by inducing a fear of conviction and punishment in the potential offender. But there is a different approach to the challenge of securing compliance with the law; an approach which treats the criminal not as beyond redemption, but as a human being with correctable flaws. The idea is that of "improving [the offender's] ... character so that he is less often inclined to commit offences again even when he can do so without fear of the penalty"[36]. It is a goal which is summarily dismissed by some - Nietzsche observed that "punishment tames man, but does not make him better"[37], and Horace Mann that "[t]he object of punishment is, prevention from evil; it can never be made impulsive to good"[38]. However for a time the goal of rehabilitation was of considerable

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[33] Ashworth, Andrew *Sentencing and Penal Policy* (London: Weidenfeld and Nicolson, 1983) p211
[34] *supra* n7, p50
[35] *ibid*, pp51-52
[36] Walker, N. 'Punishing, Denouncing or Reducing Crime' in Glazebrook, P. (ed.) *Reshaping the Criminal Law* (London: Stevens, 1978) p393
[37] Nietzsche, F. *Genealogy of Morals* (New York: Vintage Books, 1967) Essay 2, Aphorism 5
[38] Mann, Horace *Lectures and Reports on Education* (1845) 1867 edn., Lecture

importance in penal thinking, and should not be brushed over without some scrutiny.

Methods of rehabilitation have developed considerably from a starting-point dependent on the eighteenth century belief that the punishment itself would produce reform - time for contemplation, it was thought, would lead through remorse to a resolution to abide by the law in future[39]. Punishment should produce an *improved* person, not simply remove a Kantian advantage by the repayment of a debt owed to the other signatories of a notional social contract. With this in mind, probation seeks to modify the social conscience of the offender, a goal which heavily influences the sentencing of theoretically receptive juvenile offenders. Later, the procedures adopted included psychotherapy and environmental or social therapy, as secular and scientific theories replaced moral and religious concerns as the dominant modes of thought of the twentieth century. This almost medical approach to the disease of crime has not, of course, proven to be entirely successful, although it has been claimed that the application of rehabilitative procedures to offenders has not been as efficient as it could be - "[p]rograms are applied indiscriminately to heterogeneous groups of offenders, some of whom may be responsive while others are not ... It is, they say, like using insulin to treat all diseases"[40].

Sentencing to bring about a reformative effect, while obviously an issue requiring significant expertise, remains an inaccurate science. It is also a grave concern that the principle of treating like cases alike could be sacrificed to the necessity of imposing a sentence which may bring about the desired effect in the offender in question.

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[39] Beccara, Bentham, Eden and Romilly are regarded by Clarkson and Keating as "[t]he great penal reformers of the eighteenth century" (*supra* n7, p52); all prescribed a penal philosophy resting on a combination of deterrence and reform.

[40] *Supra* n7, pp16-18

Ultimately, the success of the rehabilitative ideal is to be viewed pessimistically - Walter Bailey, who examined studies of correctional outcome published between 1940 and 1960, concluded that "evidence supporting the efficacy of correctional treatment is slight, inconsistent, and of questionable reliability"[41], while an examination of 231 treatment projects conducted between 1946 and 1967 reported that *"with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism"*[42].

The voice of reason on this topic is perhaps most clearly heard in two principles which Morris and Howard identify as the basis of their belief that reformative advantages should, if possible, be sought, but only in a system which keeps the rights of the offenders in the forefront of its thinking. The first of these is that *"power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes"*[43], and the second that *"correctional practices must cease to rest on surmise and good intentions: they must be based on facts"*[44]. It should never be forgotten that "[t]he jailer in a white coat with a degree in a behavioural science remains a jailer"[45].

JUSTIFICATIONS FOR THE PUNISHMENT OF CORPORATIONS

Just as the substantive criminal law developed on the now out-dated assumption that all offenders were individuals, the philosophical justifications for punishment which have developed in parallel may be inapplicable in a corporate

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[41] Bailey, Walter C. 'An Evaluation of 100 Studies of Correctional Outcome' (1966) 57 *Journal of Criminal Law, Criminology and Police Science* 153-160, 158

[42] Martinson, Robert 'What Works? Questions and Answers about Prison Reform' (1974) 35 *Public Interest* 22-54, 25 (emphasis in the original)

[43] Morris, Norval and Howard, Colin *Studies in Criminal Law* (1964) pp175-176 (emphasis in the original)

[44] *ibid*

[45] *ibid*

context. Above all else, the criminal law seeks to provide a cogent and consistent body of rules by which an individual can live, and principles of individualism therefore inform the entire criminal law. The pervasiveness of this philosophical basis is such that the notion of a corporation committing a crime and thereby deserving punishment strikes many people as inherently odd - unnatural, almost[46]. Conditioning is so extensive that there is a reluctance to import the "corporateness of corporate action and corporate responsibility"[47] into the traditional individualistic criminal law. Where an individual is at fault, there is no suggestion that they should not be prosecuted; the issue arising here is whether, in cases of genuinely *corporate* wrongdoing, the punishment of the corporation itself can be justified.

Saltzburg claims that "a conviction of the corporation itself may substantially advance one or more of the traditional purposes of the criminal law"[48]. A similar hope is evident in a publication produced by the Herald Families Association[49], in which David Bergman states that there are three objectives to the criminal justice system - punishment, deterrence and rehabilitation[50]. His conclusion is that "[i]n practice, only the aim of punishment, particularly through the sentence of imprisonment, appears to be unambiguously served by the criminal justice

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[46] "Contemporary preoccupation with the notion that responsibility derives from and attaches to the autonomous individual renders us bereft of conceptual tools with which to confront corporate liability", according to Celia Wells *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993)

[47] Brent Fisse & John Braithwaite 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) *Sydney Law Review* 468, 476

[48] Saltzburg, Stephen A. 'The Control of Criminal Conduct in Organizations' (1991) 71 *Boston University Law Review* (2) 421-438, 425

[49] Created following the capsize of the Herald of Free Enterprise ferry off Zeebrugge on 6th March 1987

[50] By 'punishment' he means a combination of renunciation and retribution; the civil courts, with their goal of reparation, do not provide the symbolic message of censure which accompanies a criminal conviction.

system"[51], but that corporations may be more malleable than individuals in terms of deterrence and rehabilitation.

Wells argues that the criminal law must play a role in shaping the behaviour of corporate bodies because traditional sources of social control which exert an influence on individuals - parents, school, religion - do not affect corporations[52]. This is a solid basic justification for the involvement of the law, but a more specific focus is required to determine the effectiveness with which the goals of deterrence, retribution, incapacitation and rehabilitation are met. Saltzburg believes that "[p]rosecuting a corporation can serve at least some of the traditional setencing purposes. For example, a court can impose a fine that reflects the seriousness of the offense. An appropriate fine may promote corporate respect for the law, and may provide just punishment for the offense. Additionally, prosecuting a corporation may deter future corporate criminal activity"[53].

He touches here upon several of the major justifications for corporate punishment - not only Wells' underlying social regulation theory, but also deterrence, censure and just desert. It is proposed in this section to examine the effectiveness with which the proposed goals of punishment may be achieved in relation to corporations.

Desert punishment for corporations is resisted vigorously by Braithwaite, who claims that "because there is no meaningful equilibrium or reciprocity between individuals and corporations, there is no philosophical basis for calculating a

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[51] Bergman, David *Disasters - Where the Law Fails: A New Agenda for Dealing with Corporate Violence* (London: Herald Families Association, 1993)
[52] *supra* n46, pp. 16-17
[53] *supra* n48, p423

proportional punishment which would restore equilibrium"[54]. However, if the notion of equilibrium is accepted in relation to individuals, it is just as valid between different types of person - human and corporate. While claiming only to be concerned with the operation of just desert philosophy in the area of corporate crime, Braithwaite's dismissive view of Kant's notion of levelling illegally gained social advantage displays a distaste for the underpinning theory. The conclusion may be reached that for those who advocate deserved punishment for individuals, it can be justified for corporations.

Braithwaite does recognise that for those "retributivists who eschew the niceties of Kantian or Aristotelean justifications for retribution", the corporation is just as appropriate a target for revenge as the individual[55].

In 1970, the Law Commission published a Working Paper which stated that:

> "The objective in ... [industrial accident cases] ... is not merely to induce the firm to take remedial action, for in many cases in which prosecutions are taken the accident is itself sufficient for this purpose. The firm is being punished for its failure to take action before the accident, rather than its subsequent failure to comply with the requests of the Inspectorate. The purpose of such prosecution from the enforcement angle is thus to make it clear to the individual employer and to employers at large that where a firm has failed to protect the life and limbs of employees ... a penal sanction will be imposed. The rationale is that of special and general deterrence rather than administrative enforcement"[56].

This reasoning follows that of Edwin Sutherland, who claimed that "[t]he corporation probably comes closer to the 'economic man' and 'pure reason' than any other person or other organisation. The executives and directors not only

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[54] Braithwaite, John 'Challenging Just Deserts: Punishing White-Collar Criminals' 73 *Journal of Criminal Law & Criminology* (2) 723, at 731

[55] *ibid* p731

[56] Bergman, David *Disasters - Where the Law Fails: A New Agenda for Dealing with Corporate Violence* (London: Herald Families Association, 1993)

have explicit and consistent objectives of maximum pecuniary gain but also have research and accounting departments by which precise determination of results is facilitated"[57]. Therefore the financial implications of any legal infringement can be weighed, and the risk rejected if the potential cost outstrips the potential profit. In this way, the possibility of a fine serves a significant deterrent effect. There is opposing academic opinion - Dunford and Ridley note that this approach "does not take into account the fact that in the corporate context, decisions are often made collectively and that there is some evidence that managers tend to make riskier decisions when acting in groups than when acting individually"[58].

Incapacitation as a justification for corporate punishment is certainly valid - if a corporation cannot observe its obligations it may be curtailed from causing harm, but the practical problem of incapacitating a company makes this justification somewhat academic. Corporations can dissolve and then reconvene under a different name, or with an altered board of directors. There is therefore the difficulty that "a corporate conviction [does not] helpfully forewarn the public since it is unlikely that a [crime] would be repeated under the same corporate flag"[59]. An incapacitation of sorts as punishment - for example, exclusion from government contracts - may nonetheless operate as an effective deterrent. One major problem is that the practical effect of incapacitative punishment of corporations may be suffering imposed on innocent employees who lose work despite never being at fault. However, this problem of overspill is of concern when the *effectiveness* of corporate punishment is being considered[60]. Its justification on philosophical grounds is unaffected.

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[57] Sutherland, Edwin *White Collar Crime* (New Haven and London: Yale University Press, 1983)
[58] Dunford, Louise & Ridley, Ann '"No Soul to be Damned, No Body to be Kicked" [1] Responsibility, Blame and Corporate Punishment' (1996) 24 *International Journal of the Sociology of Law* 1-19, 10
[59] Andrews, John 'Reform in the Law of Corporate Liability' [1973] *Criminal Law Review* 91, 94
[60] *See* Chapter Six *below*

It is also important to look at the potential for rehabilitation in the corporate sphere. Any rehabilitation which results from a corporate crime conviction will be of value only if it focuses on the organisational structure which caused the commission of the offence rather than the individual or individuals who committed it. To concentrate on the individual at fault will have no "significant impact on institutional or structural offences that result from intraorganisational performance pressures or bureaucratic failures"[61]. Unless change goes to the heart of, for example, the company's standard operating procedures, the danger remains that offences will recur, perhaps even repeated by those who replace the individuals guilty of the original failures. This possibility is noted by Dunford and Ridley[62], who believe that the most powerful force for organisational change in the case of serious corporate crime is the media coverage and accompanying public attention - they cite the example of the conviction of OLL Ltd. following the Lyme Bay canoeing disaster as a legal judgement which received relatively little news coverage, but which led, in large part through the outrage over the tragedy itself, to the introduction of the Activity Centres (Young Persons' Safety) Act 1995[63].

While this public outrage is a force for rehabilitative change, it is also indicative of society's need to publicly declare its condemnation of criminal behaviour. On this point, Ridley and Dunford note that "[i]f the underlying reason for prosecution is to signify the moral condemnation of society, then despite the fact that change may be brought about by factors outside the criminal law, the true justification for punishment in the corporate context may include retribution as well as deterrence, and the moral justice requirement that all companies should

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[61] Metzger, M.B. & Schwenk, C.R. 'Decision making models, devil's advocacy and the control of corporate crime' (1990) 28 *American Business Law Journal* 323-377, 335
[62] *supra* n57, p5
[63] *ibid* p6 Private Member's Bill

be equally answerable before the law"[64]. And while they express an opinion that current sentencing policy falls short of these goals, they come to the important conclusion that "it is no argument to say that corporations should not be punished because current sanctions are ineffective. This confuses two separate issues: namely, the justification for punishment and the selection of an appropriate and effective sanction"[65].

As in the case of individual punishment, no single justification is exclusively dominant in the corporate context. But while practical problems may arise, the same justifications are theoretically viable as against individuals. The logic-based nature of the corporate enterprise may improve the effectiveness of deterrent or rehabilitative punishment, and as responsible actors in society, corporations are as deserving of punishment for retributive reasons as any other person.

The problem of effective corporate punishment is the focus of Chapter Six below. For now, it can be seen that corporate punishment, although problematic, is justifiable and must be tackled.

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[64] *ibid* p6
[65] *ibid* p6

CHAPTER TWO: INVOLUNTARY MANSLAUGHTER

Given that the law of manslaughter is a topic of considerable scope[1], it is necessary first to clarify exactly what is of relevance to this paper and what is outside its range. The purpose of this chapter is to identify that part of the law of manslaughter under which corporations may currently be held liable, and in order to do so adequately, it is necessary to trace the development of that law which has resulted in its present state.

As a species of homicide, manslaughter shares with murder an *actus reus* described by Coke as the unlawful killing of a reasonable creature under the Queen's peace[2]. It is with the *mens rea* of manslaughter that complications become evident, as the offence contains several subdivisions. The first of these divisions is that between voluntary and involuntary manslaughter. Voluntary manslaughter covers cases where the *mens rea* for murder is present in mitigating circumstances such as diminished responsibility[3], killing under provocation[4], or in pursuance of an incomplete suicide pact[5]. Involuntary manslaughter is that area of the law concerned with unlawful killings where the defendant possesses a mental state less than that necessary for a murder conviction. However, the law of involuntary manslaughter branches into two parts. The first is that of unlawful act manslaughter, based on the unpopular doctrine of constructive liability, which the Law Commission has recommended should be abolished[6]. It is the second of the two branches which is of interest to this paper, being the category under which

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[1] Lord Atkin noted that "[o]f all crimes, manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions" in *Andrews v DPP* [1937] AC 576, 581

[2] 3 Inst. 47

[3] Criminal Justice Act (NI) 1966 s5(1)

[4] Criminal Justice Act (NI) 1966 s7(1)

[5] Criminal Justice Act (NI) 1966 s14(1)

[6] Law Commission Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter* (London: HMSO, 1996) para. 5.16

corporate offences are likely to be charged, and the only category under which a corporate conviction has ever been obtained. While the law has recently become more settled in this area, uncertainties in the law of manslaughter were for a time so pervasive that naming this remaining form of the offence cannot be done without careful consideration. So for now, it will be given the catch-all title of reckless/gross negligence manslaughter; in the course of an examination of the development of the law, the reasons for such hesitation will become apparent.

The offence of reckless/gross negligence manslaughter is exemplified by the case of *Bateman*[7]. The appellant, a doctor, was convicted of the manslaughter of a patient who died as a result of his negligent performance of an operation upon her. His conviction was quashed on appeal because the trial judge had failed to clearly differentiate between the degrees of negligence necessary for success in civil and criminal actions, a distinction drawn in the earlier case of *Doherty*[8]. Lord Hewart CJ in *Bateman* stated that for a criminal conviction to result, it was necessary that the accused's negligence went

> "beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment"[9].

This statement is blatantly circular[10] - criminal negligence is that which is so gross as to amount to a crime - and according to some commentators, leaves issues to the jury which should be judicially decided[11]. The Law Commission has noted that the dual meaning of the word "negligence" is perhaps the basis for the confusion which

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[7] (1925) 19 Cr. App. R. 8 For an earlier example of gross negligence manslaughter, see *Finney* (1874) 12 Cox CC 625

[8] (1887) 16 Cox CC 306

[9] *Supra*, n7, p12

[10] *See* Smith, J.C. & Hogan, B. *Criminal Law* (7th ed, 1992) p 373

[11] *See*, for example, *Russell on Crime* (12th ed, 1964), pp 592-594 and Williams *Textbook on Criminal Law* (7th ed, 1983) p259

later characterised the law of involuntary manslaughter[12] - negligence can, of course, simply mean carelessness, but it also has a specific legal meaning imported from the law of tort, conveying the breach of a duty of care. The *Bateman* formulation of involuntary manslaughter required proof of four elements - the presence of a duty to take care, owed by the defendant to the deceased; a breach of this duty; a causal link between this breach and the death; and finally, negligence so gross that it be deemed criminal. However, the requirement of a duty of care for the commission of the crime of gross negligence manslaughter has not always been clear. As the case law unfolded, and particularly in recent decades, it became apparent that two schools of thought existed regarding gross negligence manslaughter. One thought that the 'careless' or 'reckless' meaning of the word 'negligence' simply indicated that recklessness was another term for gross negligence; an expression of the degree of negligence required for a finding of gross negligence manslaughter. The other thought that recklessness had come to form another category of involuntary manslaughter, distinct from gross negligence manslaughter. Hence, the working title of reckless/gross negligence manslaughter given at the start of this chapter.

The first line of thought can be seen in the House of Lords case of *Andrews v DPP*, where Lord Atkin appeared to consider recklessness to be a degree of negligence - he stated that for the "very high degree of negligence" required for the purposes of the criminal law, "of all epithets that can be applied, 'reckless' most nearly covers the case"[13]. In cases which followed, such as *Larkin*[14], recklessness was equated with negligence "of a very high degree"[15], or "criminal negligence"[16]. In *Cato*[17], the trial

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[12] Law Commission Consultation Paper No. 135 *Involuntary Manslaughter* (London: HMSO, 1994) para. 3.6-3.10
[13] *Supra*, n1 p583
[14] [1941] 1 All ER 217
[15] *Ibid*, p219D
[16] *Lamb* [1967] 2 QB 981
[17][1976] 1 WLR 110

judge instructed the jury to ask themselves whether the accused did "a lawful act with gross negligence, that is to say, recklessly"[18], a direction which was upheld on appeal. It was stressed by Lord Widgery CJ that "recklessness is a perfectly simple English word. Its meaning is well-known and in common use. There is a limit to the extent to which the judge in the summing-up is expected to teach the jury the use of ordinary English words"[19]. The Law Commission, in its Consultation Paper on Involuntary Manslaughter concluded that "[t]his line of authority therefore suggested that gross negligence, as defined in *Bateman* and *Andrews*, was the sole basis of guilt in manslaughter (apart from unlawful act manslaughter); and that 'recklessness' was either identical to or a category of gross negligence"[20].

Unfortunately, this clear-cut opinion faced a battle for acceptance against a line of thinking which regarded recklessness as a separate and distinct category of involuntary manslaughter, for one of two reasons. First of these was an understanding of "recklessness" as "indifference". The line of cases propounding this view begins, strangely, at *Andrews* also. There, Lord Atkin noted that "reckless suggests an indifference to risk"[21], and this concept is apparently distinct from the possibility that "the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction"[22]. This suggestion was compounded by the Court of Appeal decision in *Gray v Barr*[23], where Salmon LJ stated that "[t]o do a lawful act which is dangerous with a reckless disregard as to whether or not it injures another is ... manslaughter"[24]. In *Stone and Dobinson*[25], the Court of Appeal formulated a two-limbed definition of "reckless disregard" for the purposes of

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[18] *Ibid*, p114E
[19] *Ibid*, p119C-D
[20] *Supra*, n6, para. 3.68
[21] *Supra*, n1 p583
[22] *Ibid*, p583
[23] [1971] 2 QB 554
[24] *Ibid*, p576
[25] [1977] QB 354

involuntary manslaughter. The first limb covered those situations where the defendant was indifferent to an obvious risk; the second concerned the subjective recklessness of the defendant in circumstances where he comprehended a risk but determined nevertheless to run it. No mention was made of the possibility of grossly negligent attempted avoidance of a foreseen risk, as had been mentioned by Lord Atkin in *Andrews*, but because *Stone and Dobinson* was a Court of Appeal decision, the *Andrews* formulation by the House of Lords remained in place. For many years it was uncertain whether these limbs were subsections of the category of gross negligence, or distinct branches of the law of manslaughter - thankfully the issue has now been clarified by the decision described below in *Adomako*[26].

The category of subjective recklessness formulated in *Stone and Dobinson* can be seen developing through the cases of *Pike*[27] (where a direction in the form "Did D know ... and yet recklessly ...?" was approved) and *Lamb*, where Sachs LJ appeared to consider the state of mind of the defendant at the time of the act in question relevant to the issue of negligence. Also, in *Cato*, it was observed that "in deciding whether Cato had himself acted recklessly one would have to have regard to the fact, if it was accepted, that he did not know about the potentiality of the drug"[28]. Finally, in *Smith*[29], both indifference and subjective recklessness were espoused as potentially sufficient mental states for a conviction for manslaughter, Griffiths J explaining that:

> "'Reckless disregard' means that, fully appreciating that she was so ill that there was a real risk to her health if she did not get help, S did not do so, either because he was indifferent, or because he deliberately ran a wholly unjustified and unreasonable risk".

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[26] [1994] 3 All ER 79
[27] [1961] Crim LR 547
[28] [1976] 1 WLR 110, 119C
[29] [1979] Crim LR 251

The Law Commission, reviewing these authorities in their Consultation Paper on Involuntary Manslaughter, noted that "[a]gainst all these indications, however, there remained the leading authority of *Bateman* in which, when speaking of recklessness, Lord Hewart CJ explicitly stated the test to be capable of involving both advertence and inadvertence of risk". In short, the authorities were now heading in two entirely separate directions, and were in need of urgent review to prevent the law of manslaughter from becoming a mass of common law contradictions.

The law of manslaughter was to be affected, along with much of the rest of the criminal law, by the House of Lords decisions in *Caldwell*[30] and *Lawrence*[31], concerning the mental state of recklessness. Lord Diplock in *Caldwell* formulated a definition of recklessness with regard to the Criminal Damage Act 1971 which stated that a person was guilty of an offence under s1(1) of the Act if:

> "(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it"[32].

The question of whether this formulation of recklessness applied to the crime of manslaughter arose in *Seymour*[33], where the defendant had killed a woman with whom he had been living in the course of an argument following a slight collision of her car with his lorry. He claimed that he had driven forward aggressively against her car, intending only to push it out of the way; the woman was crushed between the two vehicles and died as a result of her injuries. The defendant was convicted of her manslaughter, and the House of Lords approved the trial judge's use of a

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[30] [1982] AC 341
[31] [1982] AC 510
[32] [1982]AC 310, 354F
[33] [1983] 2 AC 493

direction derived from *Lawrence*, which was of the same form as the *Caldwell* direction, but which concerned the offence of causing death by reckless driving.

Until the case of *Adomako*, therefore, the law of reckless/gross negligence manslaughter was represented by *Seymour*, with slight modifications provided by the decision in *Reid*[34] - it was not necessary to use Lord Diplock's *ipsissima verba*, and the formulation should be adapted to fit the circumstances of particular cases[35]. The differences between the *Seymour* test and the earlier law of *Andrews* were quite radical - now, once the defendant had been proved to have created an obvious and serious risk of causing physical injury to some other person, the jury could find him guilty of manslaughter whether his conduct was a result of inadvertence, subjective recklessness or poor judgement. The degree of his negligence was no longer at issue. While this widened the scope of liability, there were also ways in which the new test was narrower than before. The defendant now had to create an obvious and serious risk of physical harm by his own conduct, apparently ruling out cases of manslaughter by omission. Also, the defendant had the potential defence of the "*Caldwell* lacuna" (now acknowledged by Lord Goff in *Reid*[36]), that gap in the law whereby those who foresaw a risk, but incorrectly felt that their actions would be sufficient to negate it, escaped liability. It should be remembered that Lord Atkin, in *Andrews*, had declared that this situation would give rise to liability for manslaughter, and the situation would later be resolved in *Adomako*.

The next significant decision concerning reckless/gross negligence manslaughter came in the Court of Appeal case of *Prentice* in 1993. It both clarified the law to some extent, and was one of two cases (the other being *Scarlett*[37]) in which the

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[34] [1992] 1 WLR 793

[35] Per Lord Keith of Kinkel at 796D, Lord Ackner at 805G-H, Lord Goff at 813G-H and Lord Browne-Wilkinson at 819H-820A.

[36] [1992] 1 WLR 793, 813D

[37] [1993] 4 All ER 629

judiciary called for an urgent review by the Law Commission of the law of involuntary manslaughter, eventually resulting in Report No. 237.

In *Prentice*, the Court of Appeal considered together the appeals of two junior doctors, Prentice and Sullman, an anaesthetist Adomako and an electrician Holloway against convictions for manslaughter. Prentice and Sullman were two inexperienced junior doctors when Dr Prentice was asked by his registrar to administer drugs by lumbar puncture to a leukaemia patient. A fatal misunderstanding occurred, and Dr Prentice, believing that Dr Sullman was supervising both the initial lumbar puncture and the administration of the drugs, failed to check the labels on the syringes and the boxes in which they were contained. Dr Sullman, however, believed that he was responsible only for the supervision of the injection procedure. As a result, the patient died when Vincristine was injected into the spine rather than intravenously.

In the second appeal, Dr Adomako was the anaesthetist working on an eye operation when the patient's oxygen supply was cut off by the disconnection of a tube from the ventilator. After some six minutes the patient suffered a cardiac arrest, until which time the appellant did not realise there had been a disconnection. The patient subsequently died.

The final appeal concerned an electrician, Holloway, who wrongly earthed a domestic central heating system. The back-up safety device, a circuit breaker, was inoperative, and the family for whom it was installed experienced a series of electric shocks when they touched anything made of metal. They complained to the appellant, who unsuccessfully attempted to find the cause of the problem. He intended to return to the house to replace certain parts of the system, but before he could do so, one of the family was electrocuted in the kitchen of the house and died.

While the circumstances of all three cases were undoubtedly tragic, even a cursory glance at the facts suggests that the degree of moral culpability for the deaths varies enormously between the three situations. It is surely significant that in sentencing Prentice and Sullman, to nine months suspended for two years, the judge noted that "It seems to me that you could have been helped much more than you were helped"[38].

The defendants in all three cases were convicted of manslaughter, but the tests used to determine their guilt were not all the same. Dr Prentice, Dr Sullman and Holloway were all found guilty of reckless manslaughter according to the *Caldwell* and *Lawrence* formulation, whereas Dr Adomako was convicted under the gross negligence test. All of the defendants appealed on the ground that the wrong test for manslaughter had been applied in their respective cases.

The Court of Appeal held that the appeals of Dr Prentice, Dr Sullman and Holloway should be allowed, but the conviction of Adomako was to stand, the correct test for involuntary manslaughter by breach of duty having been applied in his case. It was the view of Lord Taylor that Lord Atkin in *Andrews* had introduced the word 'reckless' as a measure of the degree of negligence required for a criminal conviction. He confirmed that there was still a class of manslaughter by a high degree of negligence, even where the defendant was not indifferent to the consequences of his actions. However, the specific case of motor manslaughter provided difficulty because of the binding House of Lords judgement in *Seymour*. As a result, the Court of Appeal in *Prentice* chose to consider motor manslaughter as a separate case operating under its own set of rules; but "the proper test in

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[38]*R v Prentice* The Independent 10 November 1991. Quoted in "Medical 'mistake'" Diana Tribe & Gill Korgaonkar *Solicitors Journal* 15 April 1994 p372

manslaughter cases based on breach of duty is the gross negligence test established in *Andrews* and *Stone and Dobinson*"[39].

Later given leave to appeal to the House of Lords, Adomako continued to protest that he had been convicted by the application of the wrong test for manslaughter. The Lords upheld the Court of Appeal decision, confirming that involuntary manslaughter by breach of duty was established where: the defendant was in breach of a duty to the victim; that breach caused the victim's death; and that the breach of duty was such as to be characterised as gross negligence. Lord Mackay LC stated that a finding of gross negligence depended "on the seriousness of the breach of duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury's judgement to a criminal act or omission"[40]. An important feature of the *Adomako* decision is the emphasis placed on assessing the defendant's negligence *in all the circumstances in which the defendant was placed* when the incident in question occurred. This is a significant acceptance by the House of Lords of the fact that liability for gross negligence can depend on factors external to the person whose immediate act or omission caused the death. The implications of this acknowledgement as they overlap with the law of corporate manslaughter will be considered later.

The effect of the decision of the House of Lords in *Adomako* was to confirm the continued existence of gross negligence manslaughter as a species of involuntary manslaughter. The word "reckless" was not to be the subject of detailed legal elaboration, but was to be used, if desired, only in its ordinary meaning. It was not

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[39] *Supra*, n37 p88
[40] [1994] 3 All ER 79, 87

a requirement, as the appellant had contested, in the direction of juries. *Seymour* was expressly overruled[41].

Adomako, therefore, lays out the correct, and only, approach to involuntary manslaughter by breach of duty. Problems remain with the circularity of the test, and the responsibility of the jury to decide a matter of law[42] - the defendant is guilty of a crime if the jury deems her conduct to be criminal - and also with the potential confusion between civil and criminal concepts of negligence and duty of care[43]. For now, nonetheless, gross negligence has been confirmed as the proper test for the remaining category of manslaughter named with such hesitation at the beginning of this chapter.

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[41] [1994] 3 All ER 79, 87E

[42] Keating, Heather 'The Law Commssion Report on Involuntary Manslaughter: (1) The Restoration of a Serious Crime' [1996] *Criminal Law Review* 535-543, 535; Gardner, Simon 'Manslaughter by Gross Negligence' (1995) 111 *Law Quarterly Review* 22, 23

[43] *ibid* p535-536; Sharpe, Sybil 'Grossly Negligent Manslaughter after *Adomako*' (1994) 158 *Justice of the Peace* 725

CHAPTER THREE: CORPORATE CRIMINAL LIABILITY

This chapter traces the development in Britain of a system of criminal liability for corporations, from the early crude use of vicarious liability through to the twentieth century's attempts to find a sophisticated theory with which to deal with the increasing problems posed by the intrusion of industry into every aspect of daily life. Two dominant theories have emerged, neither of which is satisfactory. One, the above-mentioned concept of vicarious liability, holds the corporation liable for the wrongful acts of all of its agents, and is primarily used in the sphere of regulatory offences. For the more problematic issue of corporate liability for *mens rea* offences, the identification or *alter ego* approach of *Tesco v Nattrass*[1] has become the standard. Attention will then be paid to developments since the *Tesco* case which point to a theoretical cross-fertilisation of corporate liability systems. Finally, the explanation of these systems of liability will be followed by a discussion of the development of corporate liability for manslaughter.

Statutory promotion of corporate criminal liability emerged with the provision in the Criminal Law Act 1827 that in the absence of a contrary intention, the use of the word 'person' in a statute included corporations[2]. Corporations could be indicted after the introduction of the Criminal Justice Act in 1925[3]. It is also important to remember that an obstacle to the development of corporate criminal liability arose in the form of punishment - certain crimes were only punishable in

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[1] [1972] AC 153

[2] s14, Criminal Law Act 1827, repealed by s2(1) Interpretation Act 1889 (which provided that "person" would include a body corporate in the absence of a contrary intention)

[3] s33(3) Criminal Justice Act 1925

ways which were entirely impractical for the corporate context[4]. The ridiculous nature of the situation which thus arose was clearly exposed by Edgerton:

> "If, as in the case of 'felonies', the only punishment available for a given crime is one which cannot be inflicted upon a corporation - specifically, death or imprisonment - it is generally laid down that the corporation cannot be convicted or indicted. But it appears that the corporation may commit the crime; for an individual may be convicted of aiding and abetting the corporation to commit it, or conspiring with the corporation to commit it, though there is no way of punishing the corporation. And the corporation itself may be convicted of a crime for which the punishment provided is fine *or* imprisonment, or even fine *and* imprisonment, though it is evidently impossible to enforce the provision for imprisonment. The whole difficulty may be readily removed by a statute which makes it clear that, whatever the crime, when the defendant is a corporation a fine may be imposed"[5].

VICARIOUS LIABILITY

The origins of the doctrine of corporate criminal liability lie in the common-law concept of vicarious liability, which originally bound a master to all the wrongful acts of his servant. This liability decreased in medieval times, becoming an almost exclusively civil phenomenon[6] -

> "Criminal liability for masters ... had almost completely vanished unless the master had given his command or consent. Since corporate persons were not thought capable of giving command or consent, they were generally exempted for criminal liability"[7].

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[4] Comment, 'Corporate Criminal Liability for Homicide: Can the Criminal Law control Corporate Behaviour?' (1985) 38 *S.W. L.J.* 1275, 1276

[5] Edgerton, Henry W. 'Corporate Criminal Responsibility' (1927) 36 *Yale Law Journal* 827- 844, 830-831 (footnotes omitted, emphasis in original) The distinction between felonies and misdemeanours was abolished by s1 of the Criminal Law Act (NI) 1967

[6] Wigmore, J. 'Responsibility for tortious acts - its history' (1894) 7 *Harvard Law Review* 315-405

[7] Bernard, Thomas J. 'The Historical Development of Corporate Criminal Liability' (1984) 22 *Criminology* (1) 3-17, 6

There was one minor exception to the 'command or consent' cases; a master was criminally liable for the creation of a public nuisance by any member of his household who "layeth or casteth anything out of his house into the street or common highway" and caused damage or nuisance thereby[8], and it was a comparable crime which formed the first known form of corporate criminal liability. If local officials failed to adequately maintain the roads and waterways of their jurisdiction, the local government units were held to be criminally liable[9]. When private business corporations began to undertake such public duties as the construction and maintenance of roads, courts attached criminal responsibility to the 'master' company for the actions of its 'servant' agents. This development took place in America around the turn of the eighteenth century, while in Britain, governmental units retained responsibility for transportation for another century and a half. Significantly, the particular officials of those governmental units were also prosecuted from this time, and so the English law displayed a fledgling tendency to look for an individual to identify with the company[10]. It should be noted that the defence in the first English prosecution of a private corporation argued that "in all modern precedents individual members of the corporations are included or ascertained, and they must be proceeded against"[11].

It is well established that, while vicarious liability is not a general principle of the criminal law[12], one exception is for statutory offences which impose absolute liability on an employer for the acts of her agents, even in the absence of authorisation[13]. That a corporation may be a principal in such a case was

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[8] Ehrlich, J.W. *Ehrlich's Blackstone* (Westport: Greenwood, 1959)
[9] Elkins, J.R. (1976) 'Corporations and the Criminal Law: an uneasy alliance' 65 *Kentucky Law Journal* 73-129, 87-90; also Pollock, F. and Maitland, F.W. *The History of English Law, Vol. I* (Cambridge: Cambridge University Press, 1968)
[10] *See discussion of* The Identification Principle *below*
[11] *Birmingham & Gloucester Railway Co.* (1842) 114 E. R. 492
[12] *Huggins* (1730) 2 Ld Raym 1574, 92 ER 518
[13] *Chisholm v Doulton* (1889) 22 QBD 736

established in *Mousell Bros. Ltd. v London and North-Western Railway Co.*[14], and the test for vicarious liability was laid out by Atkin LJ as follows:

> "[W]hile *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such terms as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom in ordinary circumstances it would be performed, and the person upon whom the penalty is imposed."[15]

Mousell Bros. was accused of the fraudulent evasion of freight charges contrary to the Railway Clauses Consolidation Act 1845. The company was held to be vicariously liable for the acts of a branch manager, and the Court's focus on the nature of the duty and the person by whom it would normally be performed - the "delegation aspect"[16] of the test - was seen by Leigh as the most significant aspect of the case's contribution to corporate criminal liability.

Corporations were therefore first held to be responsible either under rules of vicarious liability for the torts of those under their employment, or later, for statutory strict liability offences (which require no *mens rea*) against public welfare. The most significant development in the area of criminal liability for corporations came with the judicial acceptance in three 1940s cases of the principle of identification - the *alter ego* idea.

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[14] [1917] 2 KB 836
[15] *ibid* p845
[16] Leigh, L.H. *The Criminal Liability of Corporations in English Law* (London: Weidenfeld and Nicolson, 1969), p30

In the cases of *DPP v Kent and Sussex Contractors Ltd.*[17], *ICR Haulage Ltd.*[18] and *Moore v Bresler*[19], the doctrine of vicarious liability could not apply because of the nature of the offences charged, but it was held that the companies could each be directly guilty nonetheless. The first case saw a corporation charged with the offences of making use of a document which was false in a material particular, with intent to deceive, and of making a statement (in the document) which it knew to be false in a material particular. It was held by the magistrates that a corporation could not be guilty of such an offence - the specific requirement of a *mens rea* (the intent to deceive) precluded such liability. Yet the magistrates recognised that the servants of the company knew the statement to be false and had used it with intent to deceive. Several decades after the American courts had recognised that corporations could be guilty of intent crimes[20], the Divisional Court saw the injustice of such a situation and held that, because "[a] company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought ... [t]he officers are the company for this purpose"[21].

The *ICR Haulage Ltd.* case also permitted an action to lie directly rather than vicariously, and the decision of the Divisional Court in *Kent and Sussex Contractors* was here confirmed by the Court of Criminal Appeal. The charge was common law conspiracy to defraud, and as noted by the Law Commission, "[t]he corporation was not held responsible on the basis of liability for the acts of its agents; instead the corporation was regarded as having committed the acts

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[17] [1944] KB 146
[18] [1944] KB 551
[19] [1944] 2 All ER 515
[20] Maakestad, William J 'Corporate Homicide' (1990) *New Law Journal* 356
[21] *supra*, n17 p155

personally"[22]. The case therefore made clear the distinction which existed between vicarious responsibility and personal corporate responsibility, and the fact that in suitable circumstances, the acts and mental states of an agent may be the acts and mental states of the corporation. The question of when acts and states of mind may be imputed to the corporation "must depend on the nature of the charge, the relative position of the officer or agent, and other relevant facts and circumstances of the case"[23].

Moore v Bresler held that a company could be liable for the acts of its agents when they acted with authority; and even if the acts were for personal rather than company benefit, the company's responsibility was unaffected. In this case the company's officers acted with intent to defraud the company, but because of their positions within the corporate hierarchy, the company was bound by their acts. The decision owes much to the concept of vicarious liability, and has been criticised for the harshness which that principle brings to the criminal law[24].

The above trio of cases, in introducing the principle whereby those in certain positions of authority are deemed to act *as* the company, was of landmark importance. The leading case in the area now, though, is the House of Lords decision in *Tesco Supermarkets Ltd. v Nattrass*[25]. The case concerned the complaint of an elderly gentleman; Tesco advertised Radiant washing powder at a reduced rate on posters outside their store, but there was no discount on the stock inside. When he enquired about the price difference, the gentleman was told that the special rate stock was exhausted, and a prosecution under s11(2) of the Trade Descriptions Act 1968 followed. The local magistrates held that the store

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[22] Law Commission Consultation Paper No. 135: *Involuntary Manslaughter* (London: HMSO, 1994) para.4.13

[23] *supra* n18 p559

[24] *See* Welsh 'The Criminal Liability of Corporations' (1946) 62 *Law Quarterly Review* 345; Williams, Glanville *Criminal Law: The General Part* (2nd ed., 1961) p859

[25] *supra* n1

manager was responsible for the breach because his system of daily checks had broken down, and made the significant finding that Tesco, as a company, had done all it could to ensure that their managers were sufficiently trained and supervised. Tesco claimed a defence under s28 of the Act, whereby they could escape liability if the failure was due to the default of another person (in this case, the store manager) and they had exercised due diligence in their attempted avoidance of the incident. Nonetheless, the company was convicted, the magistrates having concluded that the store manager was not another person for the purposes of the Act, but was to be identified as the company. By the time the case had been appealed to the House of Lords, the prosecution had accepted that the store manager was in fact another person, and the appeal therefore concerned the issue of Tesco's diligence in avoiding the circumstance complained of. In the end, the Lords decided that the manager did not act *as* Tesco's; rather he acted *for* them, and his lack of care did not mean that they had failed to exercise due diligence.

What is of real significance about the *Tesco* case, however, is not the result but the reasoning by which it was decided. The Lords gave the definitive statement of the law relating to corporate criminal liability, and in so doing replaced the "loose and flexible test of the 1944 cases"[26]. In its place the Lords adopted what has come to be known as the 'controlling officer' test from the judgement of Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*[27]:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than the hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the

[26] Burles, David 'The Criminal Liability of Corporations' (1991) *New Law Journal* 609, 610
[27] [1957] 1 QB 159

> company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."[28]

While this dictum was approved in *Tesco v Nattrass*, the majority judges had different opinions on who precisely the controlling officers of the company were. For Lord Reid it was "the board of directors, the managing director and perhaps other superior officers of a company [who] carry out the functions of management and speak and act as the company"[29]; for Viscount Dilhorne, only someone "who is in actual control of the operations of a company or of part of them and who is not responsible to another person ... in the sense of being under his orders"[30] would suffice; Lord Diplock stated that the category comprised "those natural persons who by the memorandum and articles of association or as a result of action taken by the directors or by the company in general meeting pursuant to the articles are entrusted with the exercise of the powers of the company"[31]. The finer points of the operation of the test were therefore left in a state of some uncertainty, but the identification theory nonetheless became an established legal doctrine in the *Tesco* case.

DEVELOPMENTS SINCE *TESCO v NATTRASS*

Tesco v Nattrass was supposedly the definitive statement of the *alter ego* doctrine, that anthropomorphic conception of corporate status which was to determine when a corporation could be said to have possessed the *mens rea* required for a certain offence through an officer who could be identified for these purposes as the company's 'directing mind and will'. It presented a type of corporate liability separate and distinct from the vicarious liability by which companies

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[28] *ibid*, 172
[29] *supra*, n25 p171F
[30] *ibid* p187G
[31] *ibid* p200A

were convicted of strict liability offences committed by their agents. However, this division between identification for *mens rea* offences and vicarious liability for regulatory offences is overly simplistic - there exists also a category of hybrid offences defined by Clarkson as "*prima facie* strict liability offences which provide due diligence or reasonable knowledge defences such as are common in consumer protection legislation"[32]. The offence in *Tesco v Nattrass* falls into this hybrid category, and yet, more than 20 years later, this confusion is only now being confronted for the first time[33]. In *Tesco v Brent London Borough Council*[34], the appellant supermarket chain protested against a conviction for selling an '18' certificate video to a fourteen-year-old under s11(1)(a) of the Video Recordings Act 1984. They claimed the defence provided under s11(2)(b) of the Act that the defendant neither knew nor had reasonable grounds to believe that the purchaser was not old enough to legally buy the video. It was Tesco's contention that because the defendant was the company and not the relevant cashier, it was the company's knowledge and belief, seen in those who represented its directing mind and will (rather than the knowledge and belief of the individual who sold the video) which was to be considered for the purposes of the Act.

The reaction of the Court was admirably practical; Staughton LJ recognised the absurdity of the argument, which, if accepted would mean that no company could commit this offence unless its controlling officers were manning the cash registers. As this was obviously not the situation intended by the legislature, it was necessary to construe the statute as creating no distinction between the company and its agents for the purposes of this offence. Liability could therefore be vicariously imposed.

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[32] Clarkson, C.M.V. 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557-572, 564

[33] Wells, Celia 'Corporate Liability for Crime - *Tesco v Nattrass* on the danger list?' (1996) *Archbold News* 5-8, 6

[34] [1993] 2 All ER 718

Further change to the assumed order of liability came with the House of Lords decision in *Seaboard Offshore Ltd. v Secretary of State for Transport*[35]. Following the Sheen Inquiry into the Herald of Free Enterprise capsize, a new offence of failing to take all reasonable steps to secure that the vessel was operated in a safe manner[36] had been introduced, applying specifically to 'owners' of ships[37]. The vessel in question had suffered engine failure three times within 24 hours, leaving her adrift at sea. It was found that the chief engineer, who bore responsibility for the ship's mechanical running, had first boarded the vessel three hours before she set sail; it was conceded that familiarity with the machinery would have required at least three days. The justices came to the obvious conclusion that someone in the company was at fault, and there had therefore been a failure to take all reasonable steps to ensure safe operation of the vessel. This conviction was reversed by the Court of Appeal on the ground that, assuming s31 created an offence of strict liability, it did not impose vicarious liability on the shipowner for the acts of all of its employees. The House of Lords upheld this approach, stating that "[w]here the owner ... was a corporation which could act only through natural persons, in law the natural persons who were to be treated as being the corporation for the purposes of acts done in the course of its business were those persons who by virtue of its constitution or otherwise were entrusted with the exercise of the powers of the corporation"[38]. However, the House also suggested that liability may possibly be established by proof that the company had failed to construct a system whereby the safe operation of the ship could be ensured. Unfortunately, no argument on this point had been advanced before the justices, and the Lords were therefore unable to consider this question.

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[35] [1994] 2 All ER 99
[36] s31(a) Merchant Shipping Act 1988
[37] *ibid* s31
[38] *supra* n35, p100

Wells believes that "courts have begun to show signs of frustration with the straitjacket [the identification principle] imposes on corporate reponsibility"[39]. This trend towards realism in the attribution of acts to corporations can also be seen in the significant refusal of the Court of Appeal to apply the identification principle to a health and safety charge in *British Steel plc*[40]. British Steel had been convicted following the death of a subcontracted workman under the supervision of a British Steel employee when a platform collapsed. The subsection in question imposes on every employer the duty "to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety" [41]. It was contended that the *alter ego* doctrine should apply, and that the British Steel employee could not be identified with the company, but the Court of Appeal took the view that subject to the condition of reasonable practicability, the subsection created an absolute prohibition.

> "If ... [an offence were one of] absolute criminal liability, it would drive a juggernaut through the legislative scheme if corporate employers could avoid criminal liability where the potentially harmful event is committed by someone who is not the directing mind of the company"[42].

The Privy Council case of *Meridian Global Funds Management Ltd. v Securities Commission*[43] has, according to one commentator, "effectively disposed of the myth that there exists some entity which is 'the company itself', relying instead on ordinary agency principles"[44]. *Meridian* involved an attempt by an

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[39] Wells, Celia ' A Quiet Revolution in Corporate Liability for Crime' (1995) *New Law Journal* 1326-1327
[40] [1995] ICR 586
[41] s3(1) Health and Safety at Work etc. Act 1974
[42] *supra* n40, p593
[43] [1995] 3 WLR 413
[44] Mitchell, Philip 'A Question of Attribution?' (December 1995) *Compliance Monitor* 52-53, 52

international group of investors to take over a cash-rich publicly listed New Zealand company. They intended to purchase a majority stake with bridging finance arranged through Meridian, a Hong Kong investment management company. The plan involved the repayment of this bridging finance from the resources of the target company once the takeover had been completed. The group of predatory investors included Meridian's chief investment officer and a senior portfolio manager, and while both were subject to officers higher in the corporate hierarchy, in practice the chief investment officer was given a great deal of responsibility and freedom in the business affairs of the company. The Meridian employees use of their authority to buy into the target company was improper, and Meridian as a result contravened a New Zealand statute. The Securities Amendment Act 1988, s20(3) requires that as soon as a person knows or ought to know that they are a substantial security holder in a publicly listed company, they give notice to the company and to the stock exchange. The purpose of the legislation is "to introduce transparency into dealings in publicly quoted securities and to help boards resist raids by predator investors"[45]. An action brought by the Securities Commission gave rise to a declaration that Meridian's duty to give notice had been breached; the knowledge of the chief investment officer was attributed by Heron J to the company. The Court of Appeal agreed, holding the officer to have been the "directing mind and will" of the company, a phrase used by Viscount Haldane LC in *Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd.*[46].

The company's appeal to the Privy Council was on the grounds that this directing mind and will was not the chief investment officer, but either Meridian's board or the senior manager to whom the chief investment officer was, theoretically, responsible. The Privy Council rejected this contention, and in

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[45] 'Company: From the Courts' (1994) 8 *Credit & Finance Law* (2) 14-15, 14
[46] [1915] AC 705

its advice examined the means by which acts may be attributed to a company. Primary rules of attribution, it held, are found in the company's constitution or implied by company law, for example empowering the Board or shareholders in general meeting to make decisions which are decisions *of the company*. These primary rules of attribution are necessarily supplemented by general rules of attribution of equal applicability to natural persons - the principles of agency. The Privy Council advice, however, acknowledged that these primary and general rules are sometimes not enough. Lord Hoffman noted that cases may arise "when a rule of law, either expressly or by implication, excludes attribution on the general principles of agency or vicarious liability ... a rule may be stated primarily in terms applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents ... How is such a rule to be applied to a company?"[47]. The solution proposed by the Privy Council is a case-by-case approach with a focus on statutory interpretation. Meridian was liable under the Securities Amendment Act because otherwise the policy behind the Act would be frustrated; the knowledge which is relevant for the purposes of the Act is that of the person who had the authority to do the deal, and this knowledge is that of the company. The alternative to this construction of the Act would mean that

> "Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board, or someone else in senior management, got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing"[48].

The chief investment officer's own improper reasons for not giving notice were held to be irrelevant to Meridian's liability; this was necessary for the purposes of the Act to be realised. "It is a question of construction in each case as to

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[47] *supra* n43, p419C
[48] *ibid*

whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company"[49].

The 'directing mind and will' has therefore become "an infinite variety of people from the top to the bottom of any organisation, according to the act which [it] is sought to attribute as an act of the company itself"[50]. This development, especially as it reflects a changing attitude on the part of the judiciary, is to be welcomed. However, both vicarious liability and the identification principle are forms of liability parasitic on the culpability of individuals, and in the next chapter, it will be submitted that they are therefore inherently flawed for the purpose of gauging corporate fault.

CORPORATE LIABILITY FOR MANSLAUGHTER

Corporate liability for crimes therefore developed from vicarious liability for the acts of employees, to responsibility for strict liability offences (where *mens rea* played no part), and finally to the adoption of the identification principle which allowed corporations to be held responsible for almost the full range of criminal offences, where the required mental state was possessed by a controlling director who was deemed to act, speak or think *as* the corporation. There have, however, been very few attempts at prosecuting corporations for manslaughter, and it is really only since the spate of cases of death by disaster in the late 1980s that such prosecutions seem to have found significant public support. In the opinion of Celia Wells, "[t]he introduction of a separate juristic personality for the corporate enterprise shows a legal sophistication unmatched in the later development of

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[49] *ibid*

[50] *supra* n44, p53

corporate criminal liability"[51]. Before the *DPP v P&O European Ferries (Dover) Ltd.*[52] case, the only attempts at corporate manslaughter prosecution were the cases of *Cory Bros.*[53] in 1927 and *Northern Strip Mining Co.*[54] in 1965. None resulted in a conviction. *Cory Bros.* was, of course, decided before the advent of the *alter ego* principle, and unsurprisingly it was held that a corporation could not be guilty of any offence against the person, thus precluding a manslaughter conviction. By the time of the *Northern Strip Mining Co.* case, however, there was no express argument about the validity of an indictment against a corporation for manslaughter, but the company was acquitted on the facts of the case. Explicit approval of the phenomenon of corporate manslaughter finally came in the *P&O* case arising out of the Herald of Free Enterprise ferry capsize detailed above in Chapter One. Turner J in the Central Criminal Court held that if "manslaughter ... is the unlawful killing of one human being by another human being ... and that a person who is the embodiment of a corporation and acting for the purposes of the corporation is doing the act or omission which caused the death, the corporation as well as the person may also be found guilty of manslaughter"[55]. It is to be noted that while not binding, this "ruling must have strong persuasive authority [as] [t]he point was argued in great depth by distinguished counsel and was the subject of a carefully considered and convincing ruling." It is therefore "in an altogether different class from the earlier decision ... in *Northern Strip Mining Construction Co.* ... where there is no report of any argument or of the judge's reasons"[56].

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[51] Wells, Celia 'Corporations: Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551, 558
[52] (1991) 93 Cr App R 73
[53] [1927] 1 KB 810
[54] [1965] (Glam. Assizes), *The Times*, February 2,4 & 5
[55] (1991) 93 Cr App R 72, 88-9
[56] Case and Comment [1991] *Criminal Law Review* 697

In spite of this ruling, the prosecution of P&O collapsed[57] when it was found that there was insufficient evidence against any of the named individuals to support a conviction of the defendant company, despite the fact that the inquest jury had returned verdicts of unlawful killing, and the inquiry had stated that "from top to bottom the body corporate was infected with the disease of sloppiness"[58]. The possibility of aggregating the fault of more than one of the company's employees was rejected by Turner J and the case collapsed. P&O escaped liability because "communication failures within the organisation meant that no controlling officer had sufficient information such that he should have been aware of an 'obvious and serious' risk that the ferry would sail with open doors"[59]. As Wells notes, "[t]he very failures which caused the accident allowed the company to slip through the net of responsibility"[60].

Another significant possibility given the continued dominance of the identification principle is the danger that "[t]he Crown Prosecution Service can use their prosecutorial discretion to criminally 'scapegoat' workers"[61]. Bergman gives the example of the train driver in the 1989 Purley crash who was prosecuted for the manslaughter of five people:

> "He admitted he passed a red light. Yet it does not seem that the CPS considered the conduct of British Rail executives who, in light of the known danger of error resulting from the stressful working conditions of train drivers, failed to install fail safe systems"[62].

The theory accepted by Turner J in the P&O case, that a corporation could be convicted of manslaughter, finally became a practical legal reality on the 8th

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[57] *See* Introduction *above*

[58] Department of Transport, Public Inquiry, Report of Ct. No. 8074 (London: HMSO, 1987) para. 14.1

[59] McColgan, Aileen 'The Law Commission Consultation Document on Involuntary Manslaughter - Heralding Corporate Liability?' [1994] *Criminal Law Review* 547

[60] *supra*, n51 p564

[61] Bergman, David 'Recklessness in the Boardroom' (1990) *New Law Journal* 1500, 1501

[62] *ibid* p1501

December 1994. OLL Ltd., the company in charge of the activity centre in Lyme Bay where four schoolchildren drowned during a canoeing trip in March 1993, was found guilty of manslaughter and fined £60,000[63]. It was found that "[t]he absence of communication between management and staff, the lack of safety equipment, the ignorance of emergency procedures among employees, and delays in raising the alarm and directing the search for the group all contributed to the deaths"[64].

The company was responsible for the deaths by drowning of four Plymouth teenagers while on a canoeing expedition organised as part of an adventure holiday by OLL Ltd. The teenagers[65]were part of a group of eight students, one teacher and two instructors who set out from Lyme Regis harbour on 22nd March 1993, intending to paddle across the bay to Charmouth.

The two instructors, who were described as "absolutely inappropriate" by a senior official of the British Canoe Union (BCU), had only recently passed the BCU's one star award - which the court heard had been passed by eight-year-olds and was simply a first rung on the ladder of personal proficiency[66]. Ognall J noted that the decision to take the canoeing trip grievously compromised the two young people put in charge of the party[67] - a comment which explicitly recognises that genuine blame may lie not with those immediately present but with those in positions of executive responsibility. Newspaper reports of the trial record that the canoes were "not equipped with spray decks to keep water

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[63] 'Canoe centre chief and company are found guilty' *The Times* 9 December 1994; 'Director is jailed for canoe deaths' *The Guardian* 9 December 1994

[64] 'Catalogue of mistakes that led to drownings' *The Times* 9 December 1994

[65] Dean Sayer, aged 17, Simon Dunne, Claire Langley and Rachel Walker, all 16. All were pupils at Southway Comprehensive School.

[66] 'Fatal canoe trip left expert 'staggered'' *The Guardian* 26 November 1994

[67] 'Head of activity centre jailed for manslaughter' *The Times* 9 December 1994

out[68], some life-jackets had no whistles[69], no one wore bright clothes to attract attention, no distress flares were carried and the coastguard had not been given notice of the outing"[70]. No safety boat was in attendance. Although the party was due to return by noon, the alarm was only raised by the manager of OLL Ltd. at 3 p.m., at which time he told the coastguard that the party was equipped with flares, had travelled by an inshore route, and was not due at Charmouth until 1 p.m.

The gross negligence evident in the operation of OLL Ltd. was clearly referred to in a letter sent by two former instructors at the centre to the management, explaining their reasons for resigning from the staff. Pamela Cawthorn and Richard Retallick closed their letter with the following warning:

> "Having seen your 1993 brochure and planned expansion, we think you should have a very careful look at standards of safety otherwise you might find yourself explaining why someone's son or daughter is not coming home."[71]

The words were to prove eerily prophetic - by 6 p.m. on March 22nd 1993, all of the canoeing party had been rescued but attempts to revive the four teenage victims in hospital were too late.

The company OLL Ltd. was convicted of corporate manslaughter under the identification principle of *Tesco v Nattrass*; the requirement of a 'controlling officer', whose actions were said to be those of the company, was satisfied by Peter Kite, the managing director. Responsibility for the system, and also for a brochure which claimed that "[w]herever there's a governing body of a sport, we

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[68] Martin Melling of the British Canoe Union said at the trial that a "kayak without a spray deck is a boat with a great big hole in it". (*ibid*)
[69] A Royal Navy sea survival expert said that the victims would probably have survived, had their life-jackets been inflated. (*ibid*)
[70] 'Fatal canoe trip led by unqualified staff' *The Guardian* 16 November 1994
[71] *supra* n63

have followed the procedures and guidelines laid down by them for teaching our activities", and that "[a]ll activities will run in the smoothest possible way"[72], was held by the jury to lie ultimately with Kite.

The repercussions of this case for corporate manslaughter law may not be huge in theoretical terms - the case was not even reported in the Law Reports - but its practical and cultural significance should not be underestimated. Until a conviction had been secured in the courts, there remained the possibility that those in positions of corporate responsibility would not take the crime of corporate manslaughter seriously, but would view it as a threat which would never be realised. All that must change in the wake of the Lyme Bay case. The government has been forced to change its position on compulsory regulation of activity centres[73], in no small measure due to pressure from the families of the Lyme Bay victims. Such pressure, and the media outrage and altered cultural perceptions (of concepts such as corporate manslaughter) resulting from a disaster such as this one, can have an obvious and important effect on the companies in whose hands the safety of others is placed. It is one of the few ways unnecessary deaths such as those at Lyme Bay can be anything other than tragically in vain.

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[72] *ibid*

[73] 'Activity centres face curbs' *The Guardian* 25 January 1995 The Health and Safety Executive had just published a report on safety standards at 211 outdoor activity centres, noting a lack of training procedures at 16% of centres. As the Labour MP David Jamieson noted, "[i]f only 84% of airline pilots were competent, that would not give the travelling public much confidence in using airlines". There was insufficient attention paid to risk assessment for some activities, and five centres were ordered to improve standards of safety or face prosecution.

CHAPTER FOUR: ALTERNATIVE THEORIES OF CORPORATE CRIMINAL LIABILITY

Previous chapters have dealt with the development of both the law of involuntary manslaughter and the principles of corporate criminal liability in the United Kingdom. It is submitted that those principles are highly unsatisfactory, and the purpose of this chapter is not only to explain the inadequacy of those derivative forms of liability, but also to outline some of the alternative systems advanced by those academics with an interest in the topic. Chapter Seven will later consider the proposals put forward by the Law Commission as part of its Report *Legislating the Criminal Code: Involuntary Manslaughter*[1].

DERIVATIVE LIABILITY - WHY IS IT INADEQUATE?

In a recent article[2], Eric Colvin identifies the central issue in debate about corporate criminal liability as the nature of corporate personality; the competition between 'nominalist' and 'realist' theories. The first takes the view that corporations are simply collectivities of individuals, and that corporate personality is therefore correctly deemed to be fictional - "corporate conduct or corporate fault is seen as a shorthand way of referring to the conduct and culpability of the individual members of the collectivity"[3]. A realist interpretation, however, sees that a corporation may be more than the sum of its parts - that corporations

> "shape the outlook and channel the conduct of their members in ways that may not be chosen or even understood by any of the individuals concerned. They can possess knowledge or means of

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[1] Law Commission Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter* (London: HMSO, 1996)
[2] Colvin, Eric 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* (1) 1-44
[3] *ibid* pp. 1-2

> knowledge that may be unavailable in total to any single individual. They are therefore commonly treated as 'real' entities in ordinary language and in moral discourse. They can be and commonly are 'blamed' when they have failed to exercise reasonable care to prevent harm to other persons. Moreover, they can be and they commonly are blamed while excuses are made for individual representatives"[4].

This is the approach to corporate liability which is adopted naturally by laypersons. We can accept without difficulty the concept of a large multi-national corporation 'knowing' something, in the same way that, to use Colvin's example[5], we can accept that mankind 'knows' how to put a man on the moon. Despite the fact that no single individual possesses all the necessary knowledge and expertise required to bring about a lunar landing, the information is held collectively. Through the interaction of many people, the result can nonetheless be achieved.

However, the two approaches to corporate liability which have developed both have their philosophical basis in nominalist theory. Vicarious liability and the identification doctrine both require individual culpability before liability can be imposed, parasitically, on the corporation responsible for, or identified with, that individual. Both are entirely derivative forms of liability, and this is a completely inadequate way to deal with modern corporate reality. Interestingly, criticism of vicarious liability arises because it is both underinclusive and overinclusive.

> "It is underinclusive because it is activated only through the criminal liability of some individual. Where offenses require some form of fault, that fault must be present at the individual level. If it is not present at this level, there is no corporate liability regardless of the measure of corporate fault. Yet vicarious liability is also overinclusive because, if there is individual liability, corporate

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[4] *ibid* p24
[5] *ibid* p32

> liability follows even in the absence of corporate fault. The general objection to vicarious liability in criminal law - that it divorces the determination of liability from an inquiry into culpability - applies to corporations as it does to other defendants"[6].

Discussion of the identification doctrine follows logically from discussion of vicarious liability. Despite argument to the contrary, *alter ego* liability is simply a modified or restricted form of vicarious liability, whereby the liability of a select few members of the corporate body may be imputed to the corporation. This understanding of identification is denied by those advocating a merger theory of corporate liability - that there is no vicarious liability because the individual *is* the company for the purposes of the identification doctrine. The two have merged, and the directing mind "is not acting as a servant, representative, agent or delegate. He is an embodiment of the company"[7]. This does not, however, sit easily with the fact that an individual who causes a company to be liable may also be personally liable. Theoretically, this form of liability appears to have its cake, and eat it. Brent Fisse notes that the *Tesco* principle, "which is blind to organisational theory and practice, amounts to an anthropomorphic illusion. Here as elsewhere in the context of corporate criminal responsibility, the truth is that corporations are materially different from human persons, both in constitution and being. To rely upon anthropomorphic assumptions at the expense of corporate reality is simply to succumb to the myth of a metaphor"[8].

Identification theory is therefore confused and ill-equipped to handle the intricacies of large corporations. Furthermore, as the size of the corporation increases, the number of decisions delegated to managers and agents below the level of *Tesco* 'controlling officers' also increases. Accountability is obviously a more difficult goal in larger corporations, where it is all the more vital. Ridley

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[6] *ibid* p8

[7] *Tesco v. Nattrass* [1972] AC 153, 170, per Lord Reid

[8] Brent Fisse 'The Social Policy of Corporate Criminal Responsibility' (1978) 6 *Adelaide Law Review* 361-412, 365-6

and Dunford claim that "[i]f we insist on concentrating on individual acts, then the inevitable result is that the more diffuse the responsibility, the less likely that the law will hold anyone accountable for the act. If everyone is guilty, then no-one is guilty. This is an encouragement for management to decide that 'ignorance is bliss'"[9]. Such a situation, promoted by the identification principle, goes against the very reasoning of corporate liability for crime. For the identification principle, as with vicarious liability in its broader form, there exists no necessary connection between liability and culpability - "[a] corporation's liability turns on the conduct of corporate personnel rather than on the presence of corporate fault"[10].

A fresh approach to corporate liability is called for, and the (at least partial) abandonment of derivative forms of liability will be an important part of the formulation of a liability system which reflects and comprehends the reality of corporate management and decision-making.

ALTERNATIVES:

1) AGGREGATION

The first of the alternative modes of liability to be considered is that which requires the smallest conceptual leap from the current system. Aggregation is, according to Colvin "a step toward a scheme of liability that is organizational, rather than derivative from individual liability"[11]. However, it is *only* a step.

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[9] Ridley, Ann and Dunford, Louise 'Corporate Liability for Manslaughter: Reform and the Art of the Possible' (1994) 22 *International Journal of the Sociology of Law* 309-328, 321. James Gobert warns of the same result; "[B]y their decision [in *Tesco*] their Lordships encourage a management structure which favours devolved decision-making - not for its theoretical merit, but because it will help to insulate the company from criminal liability". 'Corporate Criminality: Four Models of Fault' (1994) 14 *Legal Studies* 393-410, 401

[10] *supra* n2 p15

[11] *ibid* p19

The principle of aggregation would allow the conduct or the states of mind of individual corporate agents to be added together where insufficent knowledge or negligence lies in any single person. Acts of one person could, in combination with a fault element possessed by another, lead to corporate culpability by a different route, although the necessity of a connection between the two people in relation to the act in question has been stressed by some commentators[12]. It is a principle which has been accepted in Holland[13] and in some United States federal judgements[14], where the concept of 'collective knowledge' has been held to be valid.

No company should be allowed to escape liability where harm results from the ineffectiveness of its internal communications and management structure - as Wells points out, "[i]nevitably, there is far more information within an organisation as a whole than is possessed by one individual", and therefore, "however widely the boundary of identification is drawn, in some cases this will miss the mark and fail to capture the essence of wrongdoing"[15]. In fact, the failure-rate of the identification principle may be much greater than this comment admits - other commentators contend that "the way in which responsibilities are distributed throughout a corporate body makes it extremely unlikely that the necessary fault will ever reside entirely in a single identifiable individual director"[16].

However, Colvin believes that the qualification to the basic model of derivative liability within which aggregation still operates "is so great that the usefulness of the basic model is called into question ... The question to be asked is not whether

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[12] *ibid* p22
[13] Stewart Field and Nico Jörg 'Corporate Liability and Manslaughter: Should We Be Going Dutch?' [1991] *Criminal Law Review* 156-171
[14] *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987)
[15] Wells, Celia *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993) p132
[16] Slapper, Gary 'Crime Without Conviction' (1992) *New Law Journal* 192-3

responsibility can be constructed from bits and pieces of information about individuals, but rather whether it inheres in the organization itself"[17]. Similarly, Wells notes that "[a]ggregation needs to be seen as a recognition that individuals within a company contribute to the whole machine; it is the whole which is judged, not the parts. So the question would not be whether employee X's knowledge plus employee Y's knowledge added up to recklessness or whatever, but whether, given the information held amongst a number of 'responsible officers', it can be said that the corporation itself was reckless"[18].

2) SYSTEM-BASED LIABILITY

There is growing support for the more radical view that the ties of derivative liability must be severed in favour of an approach which reflects the "corporateness" of corporate conduct[19]. By this is meant the idea of "organisational blameworthiness as opposed to merely fault on the part of one representative"[20]. According to Fisse, organisational blameworthiness can be found where a corporation "has a policy of non-compliance with the law, where it has failed to take reasonable precautions or to exercise due diligence against non-compliance, or where it has been criminally negligent"[21]. Colvin argues that "the concepts traditionally used in addressing issues of culpability have collective meanings in ordinary language and can be given collective interpretations when they occur in statutory contexts". Taking this possibility a step further than some commentators, Colvin believes that this approach may be used not only for the concept of negligence, but also for subjective fault terms

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[17] *ibid* p23
[18] *supra* n15, p144
[19] Fisse, Brent and Braithwaite, John *Corporations, Crime and Accountability* (Sydney: Cambridge University Press, 1993) pp. 19-31
[20] Fisse, Brent 'The Attribution of Criminal Liability to Corporations: A Statutory Model' (1991) 13 *Sydney Law Review* 277-297, 281
[21] *ibid* pp. 281-282

such as recklessness, knowledge and intention. Bergman concurs with this idea, believing that in fact

> "corporate *mens rea* is often much easier to discover than that of an individual. No individual produces minutes, policies and directives, yet this is precisely what a company does. A company's intentions and state of knowledge is more readily accessible than those of any person ... The problem does not lie with a company failing to have an identifiable *mens rea*, or indeed with it lacking the characteristics which determine 'morality'. It lies with the failure of legal jurisprudence to define a principle which allows lawyers in such cases to identify the *mens rea* and then judge whether or not it is culpable"[22].

System-based liability has been adopted in Australia[23] and heavily influences the proposals of the Law Commission discussed below in Chapter Seven. To avoid repetition it will not, therefore, be dealt with in detail presently.

3) REACTIVE CORPORATE FAULT

A possibility is that alternatives to the identification principle should focus not only on the illegal act itself but also on the reaction of the corporation to the admitted occurrence of that act. This approach has been adopted by Brent Fisse in his proposed statutory model for the attribution of corporate criminal liability[24]. Fisse believes his model avoids both the restrictiveness of the *alter ego* principle and the unfairness of holding corporations liable for serious individual crime under principles of vicarious liability. He summarises his proposals as follows:

> "Under these proposals, corporate entities are subject to liability for an offence where:

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[22] Bergman, David *Disasters - Where the Law Fails: A New Agenda for Dealing with Corporate Violence* (London: Herald Families Association, 1993) p18

[23] *See* Chapter Five *below*

[24] *supra* n20

(1) the external elements of the offence have been committed by a person for whose conduct the corporate defendant is vicariously responsible; and
(2) where the corporation has been at fault in one or other of the following ways:
(a) by having a policy that expressly or impliedly authorises or permits the commission of the offence or an offence of the same type;
(b) by failing to take due precautions to prevent the commission of the offence or an offence of the same type;
(c) by having a policy of failing to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence; or
(d) by failing to take due precautions to comply with a reactive duty to take preventive measures in response to having committed the external elements of the offence"[25].

This approach does not ignore the principle of vicarious liability, but qualifies its operation. It is not used here in connection with the mental element of culpability, but simply with what Fisse terms the "external elements" of the offence - the *actus reus*. The second advantage of this approach, according to Fisse, concerns liability for the mental element; he chooses to replace the Tesco principle with "the concept of organisational blameworthiness, as reflected by a corporate policy of non-compliance or a failure to take reasonable precautions and to exercise due diligence"[26]. Needless to say, an explicit policy of non-compliance with, for example, health and safety regulations will be unlikely; but it is enough under Fisse's model that such a policy can be implied from the actions, decisions and standard operating procedures of the company.

Finally, this model introduces the concept of reactive fault[27] - what is significant under this concept is not the initial commission of the external elements of the crime, but the response of the company to that act or omission. If it is clear that

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[25] *ibid*, p279
[26] *ibid*, p279
[27] *Elaborated in* Fisse 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141 at 1183-1213

the corporation has failed to re-evaluate its policies and procedures in the light of such an event, and has thereby impliedly accepted that event and the risk of its reoccurrence, then it is liable under Fisse's proposed code. This approach has strong echoes of the Dutch concepts of 'power' and 'acceptance'[28] outlined in Chapter Five below, and shares with the Dutch approach an ability to examine not just individual culpability but the guilt or otherwise of the corporate enterprise.

However, it is submitted that the reaction of a company to the commission of a criminal act is a factor which needs consideration only in relation to mitigation. It has been argued that in the case of a hit-and-run driver, "it is not so much the hitting but the running after the event that provokes condemnation" [29]. It is nonetheless the hitting with which the law is primarily concerned, and so it should be in cases of corporate deviance. Were the law to operate as Fisse suggests, it would allow corporations to do anything once, as long as the repetition of the crime is avoided.

4) AFFIRMATIVE DEFENCES

Concerns with the fundamental approach taken by the courts to the problem of corporate liability have led James Gobert to formulate a system-based model of fault which centres around a defence of due diligence[30]. Gobert believes that "[a] conceptually different approach to corporate criminality would locate fault within the company itself without reference to individual liability"[31]. For such a simple statement, this is a deceptively radical proposal. As Gobert points out,

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[28] *supra* n13
[29] Fisse, Brent and Braithwaite, John 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11 *Sydney Law Review* 468-513, 505
[30] James Gobert 'Corporate Criminality: New Crimes for the Times' [1994] *Criminal Law Review* 722-734
[31] *ibid*, p723

most theories of corporate criminal responsibility are variations on the theme that the company is liable for the crimes of those individuals for whom it bears responsibility. He suggests that instead of imputing *mens rea* from an individual, or using false constructs to determine corporate *mens rea*, the company should be able to refute accusations by a defence of due diligence. This diligence, he claims, should be proven on the balance of probabilities; "[a]s the company is in the best position to know what it has done to protect against the commission of a crime, the burden of establishing due diligence should be on it"[32]. He also notes that while compliance with standards within the industry in question may be positive evidence, the possibility cannot be ignored that those standards are too low and the entire industry is acting in a culpable manner.

Gobert's theory has several advantages. Primarily, it does not fail to see the corporate forest by focusing too intently on the trees of individualism. But he also takes pains to explain that this approach is not results-based. He claims that "[t]he mere fact that a death has occurred would not preclude a finding of due diligence ...[for t]hat would be to surrender to the fortuity of consequence"[33]. The focus should be on the harm which the action or inaction of the company threatens to bring about, and not simply be reliant on what occurs. This, he claims, is the only way to build a climate of responsibility in the corporate sphere, which is arguably the most significant purpose the law of corporate criminal liability possesses.

The following chapter continues this examination of proposed alternatives to the present scheme of liability with a consideration of the approaches adopted in several other jurisdictions.

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[32] *ibid*, p730
[33] *ibid*, p732

CHAPTER FIVE: COMPARATIVE STUDY

In any examination of the law with a view to possible reform, substantial attention must be paid to the approaches adopted by other jurisdictions. This chapter will outline the systems of corporate liability in use in the United States, the Netherlands and Australia in an attempt to draw lessons from the experiences of practical application of alternative systems. In this way, comparison can be made with another common-law system, a rare continental acceptance of coporate criminal liability, and a statutory model. The section devoted to the United States also provides a detailed account of the Ford Pinto case which saw the first prosecution for reckless homicide, and which is of high interest for the evidence it provides of how corporate conduct came to be perceived as criminal.

UNITED STATES

The earliest origins of American corporate liability are broadly similar to those of the English law outlined in Chapter Three above, so by the end of the nineteenth century, corporate liability for crimes which did not require specific intent was generally established in the United States. Originally, corporations were held to be liable for nonfeasance[1], but not misfeasance[2]. The move from prosecuting corporations only for omissions - failure to maintain, for example - to prosecuting also for positive actions, came with the New Jersey case of *State v. Morris & Essex Railroad Co.*[3], six years after a similar ruling in an English court[4]. The development of the tort doctrine of *respondeat superior* in the nineteenth century enabled courts to impute the actions of a servant to a principal, and

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[1] *Desmarais v Wachusett Regional School Dist.* 360 Mass. 591 (1871)
[2] *State v Greate Works Milling & Mfg. Co.* 20 Me. 41 (1841)
[3] 23 N.J.L. 360 (1852)
[4] *R v Great North of England Railway* (1846) 115 E.R. 1294

those of an individual to a corporation, with greater ease. The illogical distinction between corporate liability for nonfeasance and for misfeasance was therefore overcome, but the case also contained the limiting observation that "a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving *malus animus* in its commission"[5].

In the 1904 case of *United States v. Van Schaick*[6], a federal appellate court held that the absence of an applicable penalty did not of itself exonerate the corporation of liability for murder - instead, the lack of a suitable corporate penalty should be viewed as an oversight unless the contrary is indicated[7]. *Van Schaick* involved a disaster at sea in which nine hundred people died. An indictment was brought concerning the company's failure to make its vessel seaworthy, and the lack of an appropriate punishment was advanced as a bar to prosecution. While the indictment was upheld, it has been noted that the federal district court involved "merely skirted the issue by suggesting that the social utility of such prosecutions clearly outweighed such an 'inadvertent' oversight by Congress"[8].

It has also been suggested that the protection afforded to corporations in the eighteenth and nineteenth centuries because of the lack of suitable penalties for homicide convictions could have been removed by the adoption of a judicial analogy between corporate dissolution and the death penalty[9]. This idea, while imaginative, is ultimately fruitless - the analogy breaks down, unable to cover the potential for corporate resurrection in a different form.

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[5] *supra* n3 p364
[6] 134 F. 592 (S.D.N.Y. 1904)
[7] *ibid* p602
[8] Maakestad, William J. 'Corporate Homicide' (1990) *New Law Journal* 356-357, 356
[9] Davids, L. 'Penology and Corporate Crime' (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 524-531, 530

From the turn of the twentieth century, American courts began to break away from the example being laid by the English. Coffee Jr. notes that "American courts responded to the political climate of the Progressive era, both by expanding corporate liability to include *mens rea* offenses and by making irrelevant the level of the agent within the corporate hierarchy"[10]. The Supreme Court's decision in *New York Central & Hudson River R.R. v. United States*[11] remains the keystone of American federal corporate criminal liability. The 1903 Elkins Act[12] had prohibited the granting of rebates by common carriers in interstate commerce, and contained the following provision:

> "In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person".

Congress had therefore clearly intended to impose vicarious liability on corporate bodies for a crime requiring specific intent. The provision which brought about this extension of liability was, according to Bernard[13], the result of several studies by the Interstate Commerce Commission, which found that "statutes against rebates could not be effectively enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments"[14]. The Supreme Court's reasoning was simple - if the law bound only individuals, "many offenses might go unpunished". It was added that the Court could "see no valid objection in law

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[10] Coffee Jr., John C. 'Corporate Criminal Responsibility' in *Encyclopedia of Crime and Justice Vol. I* pp. 253-264, 254 Kadish, Sanford H. (ed.) (London: Collier Macmillan Publishers, 1983)
[11] 212 U.S. 481 (1909)
[12] 49 U.S.C. ss. 41-43 (1976 & Supp. III 1979), mostly repealed
[13] Bernard, Thomas J. 'The Historical Development of Corporate Criminal Liability' (1984) 22 *Criminology* 3-17, 9
[14] *supra* n11, p495

and every reason in public policy why the corporation ... shall be punishable by fine because of the knowledge and intent of its agents"[15]. The constitutionality of the Elkins Act prohibition was therefore upheld, and the ability of a corporation to possess intention through its agents enshrined in law.

The legislative intent to hold corporations liable for the criminal intention of their agents requires qualification - the agent's behaviour must fall into certain categories. There is no liability where the agent was not acting within the scope of his employment or authority, and did not intend to benefit the corporation. It has been held on occasion that these two requirements for liability overlap, and that an agent who does not intend to benefit the corporate body can never be acting within his scope and authority[16]. It should be noted that it is irrelevant whether or not an actual benefit to the company resulted; the intention is the significant factor. Where that intention is present, liability may result even if the acts in question defied express corporate policy[17].

CORPORATE LIABILITY FOR HOMICIDE

The issue of corporate liability for homicide, despite *Van Shaick*, remained unsatisfactorily resolved. While *Van Shaick* had decided that a corporation could be guilty of homicide, the wording of many state homicide statutes precluded convictions due to ambiguity concerning the status of the corporation as a 'person'.

Despite the advances made with the *New York Central* decision, problems remained which prevented the conviction of corporations for homicide. By this

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[15] *ibid*
[16] *United States v. Beusch* 596 F. 2d 871 (9th Cir. 1969)
[17] *United States v. Cadillac Overall Supply Co.* 568 F. 2d 1078 (5th Cir. 1978)

stage, the last federal homicide statutes had been repealed by Congress, and the state statutes which governed the offence frequently employed a definition of homicide as "the killing of a human being by another human being"[18]. Such terminology clearly excluded corporations, although 'person' instead of 'human being' would not.

Initial attempts at prosecuting corporations concentrated on negligent homicide. In the 1909 New York case *People v. Rochester Railway and Light Co.*[19], a utility company was charged with the manslaughter of an apartment house tenant after the "grossly improper" installation of residential gas fixtures. The indictment was dismissed due to the wording of the statute in question, which concerned "the killing of one human being by another", but the court remarked *obiter* that the simple amendment of the statute by, for example, the addition of the word 'person' after 'another' would allow an action to lie against a corporation - as it stood, however, 'another' implied 'another human being'. *Rochester Railway* therefore saw the conceptual possibility of a corporate conviction for negligent homicide receive the approval of the New York Court of Appeals. Although the statute's wording stopped the prosecution at this point, the first step toward corporate liability for homicide had been taken.

This advice of the Court in *Rochester Railway* was heeded by the New York legislature[20] and the amendment of the statute resulted in progress with the case of *People v. Ebasco Services, Inc.*[21]. Corporate liability for negligent homicide therefore faced no conceptual barrier or difficulties of statutory construction in this case, and the indictment (which concerned the deaths of two workmen in the

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[18] *supra* n13, p11
[19] 195 N.Y. 102, 88 N.E. 22 (1909)
[20] N.Y. Penal Law s125.05[1]
[21] 77 Misc. 2d 784, 354 N.Y.S. 2d 807 (Sup. Ct. 1974)

collapse of a structure which the company had built over a river) was eventually dismissed only because of technical defects[22].

The first time a negligent homicide indictment against a corporation was successfully upheld by an appellate court was in the New Jersey Supreme Court case of *State v. Lehigh Valley Railroad*[23]. The company's locomotive exploded, killing a bystander. The Court observed both the general growth of corporate liability and the impediment to such development posed by statutory construction such as that in *Rochester Railway*; faced with this pragmatic approach to the issue, the company eventually pleaded *nolo contendere* and was fined $1,000[24]. While this decision came from a reluctance to stymie the development of a system of corporate liability, it was explicitly limited to *negligent* homicide. The ruling did not extend to, for example, treason or murder, or any crime requiring "corrupt intent or *malus animus*"[25], but because negligent homicide does not entail intention, it can be distinguished:

> "A corporation may be held [liable] for criminal acts of misfeasance or nonfeasance unless there is something in the nature of the crime, the character of the punishment prescribed therefor, or the essential ingredients of the crime which makes it impossible for a corporation to be held. Involuntary manslaughter does not come within any of these exceptions"[26].

The United States' first prosecution for reckless homicide came with the 1978 Ford Pinto case detailed below. Before explaining the significance of the Pinto case, however, it is necessary to examine other aspects of the American approach to corporate liability which differ from the system in this jurisdiction.

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[22] *ibid* at 788, 354 N.Y.S. 2d at 812
[23] [1917] 90 N.J.L. 372, 103 A. 685
[24] *State v. Lehigh Valley R.R.*, 92 N.J.L. 261, 261, 106 A. 23, 23 (1919)
[25] *supra* n23, p372
[26] *ibid* p374

MODEL PENAL CODE

Attention must be paid to the influence of the Model Penal Code, which was drafted by the American Law Institute for the consideration of state legislatures. The section concerning corporate liability[27] is premised on the idea that

> "the basic purpose of corporate criminal liability is to encourage managerial diligence in supervising corporate obedience to law, rather than to punish or deter corporate violations generally. This premise in turn rests on the belief that the criminal law has no other realistic aim in punishing the corporation and should not impose losses on innocent stockholders for acts that their managerial agents sought reasonably to prevent. Accordingly, by creating an incentive to encourage managerial supervision through its provision of an affirmative defense of 'due diligence', the Code seeks to accomplish what it believes can be achieved - increased supervision and oversight within the entity - without imposing the potentially high cost of general deterrence on shareholders"[28].

The solidity of this philosophical framework - basically, a belief that corporations are inherently good and require merely to be guided in the best way to act - is extremely questionable, and a long way from the thinking which underpins the law of individual criminal responsibility. There is also uncertainty as to the innocence of shareholders; investment is a risk in which one must be prepared to take on both the financial good fortune of a company and also the penalties it incurs if the shareholder-appointed directors act unscrupulously.

Three forms of corporate liability arise under the Model Penal Code. The first concerns crimes where there is no explicit legislative intent to impose corporate liability, and in such cases, an equivalent system to that of 'alter ego' liability is adopted. A corporation may therefore be liable only when the criminal act of an agent is performed, authorised or recklessly tolerated by the board of directors

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[27] Model Penal Code, Sec. 2.07: "Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf" (Proposed Official Draft 1962)
[28] *supra* n10, p255

or a high managerial agent[29]. 'High managerial agent' is given a much broader definition than its British equivalent, however - it is taken to mean any officer or other agent "having duties of such responsibility that his conduct may be fairly assumed to represent the policy of the corporation"[30].

Where a legislative intent to impose corporate liability *is* clear, the Code uses the principle of *respondeat superior* described above to impute to the corporation the acts of an agent acting within the scope of his employment and with an intent to benefit the corporation[31]. The difference from the federal rule lies in a defence provided whereby the corporation can avoid conviction by proving that a high managerial agent with relevant supervisory responsibility acted with due diligence to prevent it[32].

Finally, the Code provides for offences of strict liability - because no element of intent is necessary for the commission of these crimes, the Code assumes a legislative intention to hold corporations liable. The principle of *respondeat superior* applies unless the contrary expressly appears[33] and a due diligence defence is not accepted.

The Model Penal Code has been of great influence in the drafting and amendment of statutes for many state legislatures - the Pinto prosecution detailed below, for example, would have been unlikely without the adoption by Indiana of the Code's provisions in 1977, and as such it deserves the credit given to it by Maakestad as a "long overdue catalyst"[34] to the prosecution of corporations for serious intent crimes such as homicide.

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[29] Model Penal Code, s. 2.07(1)(c)
[30] *ibid* s. 2.07(4)(c)
[31] *ibid* s. 2.07(1)(a)
[32] *ibid* s. 2.07(5)
[33] *ibid* s. 2.07(2)
[34] *supra* n8, p357

AGGREGATION IN THE UNITED STATES

The breadth of American federal corporate liability is considerable - it is not required by federal law that the *actus reus* and *mens rea* of an offence be found against the same individual. For example, a criminal act could be committed by a low-level employee, and the necessary mental state be imputed to the corporation from a supervisory official who tolerated the act in question. In fact, the person who committed the *actus reus* need never be identified, if it can be shown that *someone* within the corporation must have so acted. In keeping with this thorough rejection of the British identification principle, the company may be convicted even if all individual defendants are acquitted.

Another concept which has found favour in some U.S. courts is that of 'collective knowledge', whereby no individual agent possesses the requisite knowledge for the fulfillment of the mental element of the offence, but such knowledge was present within the corporation, albeit shared between several individual agents[35]. It has been held that "[a] collective knowledge instruction is entirely appropriate in the context of corporate criminal liability. Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation"[36]. Similarly, in *United States v T.I.M.E.-D.C., Inc.*: "[K]nowledge acquired by employees within the scope of their employment is imputed to the corporation. In consequence, a corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual employee who then should have comprehended its full import. Rather, the corporation is considered to

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[35] *United States v. T.I.M.E.-D.C.*, Inc., 381 F. Supp. 730 (W.D. Va. 1974)
[36] *United States v. Bank of New England*, 821 F. 2nd 844, Court of Appeals (First Circuit) 1987

have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly"[37].

THE FORD PINTO CASE

An expansive system of corporate homicide liability came a step closer with "one of the most significant criminal court trials in American corporate history"[38]. The Ford Motor Company, at that time the world's second largest automobile manufacturer[39] and fourth largest corporation[40], was indicted by a county grand jury in Elkhart, Indiana on September 13, 1978; the company faced three charges of reckess homicide and one count, later dropped at the prosecutor's request, of criminal recklessness. Recklessness, of course, is a standard of culpability considerably higher than negligence - the indictment against Ford was of legal importance because of the element of intention inherent in the charge of reckless; and intention, until this case, had never been imputed to a corporation.

The homicide charges referred to three teenage girls who died when a collision caused the Ford Pinto in which they were travelling to burst into flames. Sisters Judy and Lynn Ulrich and their cousin, Donna Ulrich, were making a twenty mile journey on August 10, 1978. When struck from behind by a van on U.S. Highway 33 in northern Indiana, the 1973 Pinto, driven by Judy, was quickly engulfed in flames. Donna and Lynn died at the scene, trapped inside the car; Judy was thrown clear but suffered third-degree burns on over 95% of her body and died eight hours later. She was conscious following the crash[41].

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[37] 381 F. Supp. 730 (W.D.Va. 1974) at 738-9
[38] 'Ford's Pinto: not guilty' (1980) 95 *Newsweek* (March 24) 74
[39] Swigert, Victoria Lynn & Farrell, Ronald A. 'Corporate Homicide: Definitional Processes in the Creation of Deviance' (1980-81) 15 *Law & Society Review* (1) 161-182, 161
[40] Clinard, M. & Yeager, P. *Corporate Crime* (New York: Free Press, 1980)
[41] Strobel, Lee *Reckless Homicide? Ford's Pinto Trial* (South Bend, IN: And Books, 1980)

Perhaps nothing would have come of the Ulrich girls' deaths were it not for a widespread concern which had been growing for some time about the safety of the Pinto. In a syndicated editorial for The Washington Post on December 30, 1976, it was alleged by Jack Anderson and Les Whitten that "[b]uried in secret files of the Ford Motor Company lies evidence that big auto makers have put profits ahead of lives. Their lack of concern has caused thousands of people to die or be horribly disfigured in fiery car crashes. Undisclosed Ford tests have demonstrated that the big auto makers could have made safer automobiles by spending a few dollars more on each car"[42]. This was followed by the publication of an article by Mark Dowie[43] which was promoted on its release by consumer advocate Ralph Nader and summarised in The Washington Post through a series of news releases. Dowie claimed that his exposé was based on documents obtained from Ford which showed that, for six years, the company had been selling cars with improperly designed fuel tanks which would burst on impact. Moreover, he alleged that this knowledge was possessed by company officials and that despite between 500 and 900 burn deaths as a result, the corporation had ignored tests which pointed to the Pinto's dangers - according to Dowie, Ford had crash-tested the Pinto eight times before its release, and it had failed eight times[44]. He explained that the location of the Pinto's gas tank was such that a rear-end collision was liable to cause the puncturing of the tank by the bolts of the fender. The result would be substantial fuel leakage and fires, even in low-speed collisions. The defect in the placement of the fuel tank could have been fixed for a cost of about $11 dollars per car[45] - Dowie alleged that although this problem came to light in the initial stages of production, a decision

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[42] Anderson, Jack & Whitten, Les 'Auto Maker Shuns Safer Gas Tank' *The Washington Post* December 30 1976: B7

[43] Dowie, Mark 'Pinto Madness' (1977) *Mother Jones* (September- October) 18-32

[44] *ibid* p20

[45] Cullen, Francis T., Maakestad, William J., and Cavender, Gray 'The Ford Pinto Case and Beyond: Corporate Crime, Moral Boundaries and the Criminal Sanction' in Hochstedler, Ellen (ed.) *Corporations as Criminals* (Beverly Hills, London, New Delhi: Sage Publications, 1984) p127, n2

was made by Ford not to remedy the error because "the cost of settling the suits brought by burned victims and survivors of the dead would be less expensive than installing an eleven-dollar fuel bladder in each car"[46]. When a Ford engineer called an emergency meeting to discuss the safety issue, no company executives showed up. Most damning of all, Dowie produced an internal Ford memorandum which demonstrated that the company had calculated that the cost of a recall would exceed that incurred because of injuries and deaths "associated with crash-induced fuel leakage and fires".

The article increased the newsworthiness of the Pinto dramatically. A study by Swigert and Farrell[47] shows how the reports concerning the Pinto from January 1970[48] to September 1978 evince three significant trends. Firstly, a vocabulary of deviance can be seen developing in relation to behaviour not previously analysed in such terms[49]. There is, secondly, a notable personalisation of harm accompanying the new conception of this behaviour as potentially criminal[50]. And finally, there is an increasing focus on the nonrepentance of the offender[51] - a factor with, it appears, an important impact on the attitude of a public coming to see a company as an enemy of its own consumer group. It was in this climate of increased hostility toward Ford that the Ulrich girls died, and it was the awareness of this that led State Trooper Neil Graves to pursue the possibility that Ford's liability for these deaths merited serious investigation.

When Graves arrived at the scene of the crash, he observed that the front floorboard of the Pinto was soaked in gasoline, and that the difference between

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[46] Miester Jr., Donald J. 'Criminal Liability for Corporations that kill' (1990) 64 *Tulane Law Review* 919-948, 928
[47] *supra* n39
[48] The Pinto was launched onto the automobile market in the autumn of 1970.
[49] *supra* n39, pp.170-172
[50] *ibid* pp.173-174
[51] *ibid* pp.174-176

the damage sustained by the two vehicles involved was remarkably wide. The van, which eyewitnesses claimed was not speeding, was only slightly damaged, while the charred Pinto was badly crushed in the rear[52]. Graves had read and remembered Dowie's 'Pinto Madness' article and spoke with Elkhart County's State Attorney Michael A. Cosentino, who began to consider a possible prosecution of Ford under Indiana law. A revision of the state's criminal code which came into effect on October 1, 1977, provided that "[a] person who recklessly kills another human being commits reckless homicide"[53], and the definition of 'person' under the code included 'corporation'[54].

The issue of the Pinto's dangerousness was still escalating in terms of media interest - Ford were subject to a number of civil suits brought by burn victims, and in the case of a 13-year-old boy who suffered burns over 95% of his body, a damages award was made against Ford which the boy's lawyer described as the "loudest noise that the jury has made in any civil suit in American jurisprudence"[55]. The boy, Alan Grimshaw, was awarded $2.841 million for personal compensation; punitive damages, which may be awarded only in relation to intentional injury or negligence so gross as to amount to intentional injury, were set at $125 million[56]. Around this time a number of groups in the public sector withdrew the Ford Pinto from service[57]. Accounts of Pinto fires in the media increased attention on the deaths and injuries caused while reducing the focus on the mechanical defect creating the problem. Harm was, as Swigert and Farrell catalogue, being personalised as the Ford Pinto became a national consumer issue. At the same time, the responses of the Ford Motor Company

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[52] *supra* n45, p112
[53] Indiana Penal Code, section 35-42-1-5
[54] *ibid* section 35-41-1-2
[55] 'Youth Awarded $128 Million in Car Explosion' *The Washington Post* September 8, 1978: F2
[56] The trial judge reduced the total award to $6.6 million two weeks later.
[57] The State of Oregon, Pacific Northwest Telephone Company, United States General Services Administration - *supra* n 39, p172

were generally devoid of any acceptance of responsibility for the problem - only 18% of media references to company statements examined by Swigert and Farrell contained an element of repentance from the corporation[58]. And so to some, the possible prosecution of Ford took on the symbolic significance of a crusade, and "Ford's handling of the Pinto ... came to symbolize what was wrong with corporate America"[59].

Ford had been ordered to recall Pintos made between 1970 and 1976 for the necessary repairs in June, 1978, following an investigation by the National Traffic Highway Safety Administration. While this was both expensive and embarrassing to the company, it was nonetheless utterly overshadowed by the news that a grand jury convevned by Michael Cosentino had returned indictments for three counts of reckless homicide in September of that year. Faced with a maximum possible fine of $30000 ($10000 for each death), Ford would go on to spend an estimated $1.5 to $2 million on its defence[60]. This alone is a weighty piece of evidence of the potential deterrent effect of corporate criminal liability. The fact that a criminal conviction is so vigorously to be evaded suggests that the stigmatising nature of corporate crime is well recognised by those whom it may affect.

Cosentino's team, without the resources which Ford could provide for its defence, was at a severe disadvantage at trial. It was also fighting a case which was limited to a very precise set of facts. The reckless homicide statute in question had come into force on October 1, 1977, but had only been amended to include acts of omission as well as positive actions on July 1, 1978. Because the Ulrich girls' Pinto was manufactured in 1973, Ford could not be charged with the

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[58] *ibid* p174
[59] *supra* n45, p114
[60] *ibid* p122

reckless design and manufacture of the car, but only with a reckless failure to fulfill its obligation to repair between July 1 and the crash on August 10. The trial judge took the highly dubious stance that material predating 1973 was irrelevant to the case; in practical terms, this was a devastating blow to the prosecution, who were relying on Ford documents and crash tests for the 1971 and 1972 Pintos to show that the problem was known to company officials and ignored in the development of the 1973 car. Cosentino did not, however, have access to results of crash tests at low speeds for the 1973 model and could not afford to conduct such research. As a result, Ford's defence team managed to keep a great deal of the documentary material compiled by the prosecution out of evidence - all but 20 of the 300 documents which were alleged to show Ford's cover-up of the Pinto design flaw, according to some commentators[61].

The defence also presented an alternative version of the events of August 10, with two surprise witnesses who testified that, before she died, Judy Ulrich claimed that her car was stopped on the highway. The defence also produced crash test results which showed that, even with a speed differential of fifty miles per hour, a van of the sort which collided with the Ulrichs' Pinto would be likely to escape with little damage. Central to the defence was the assertion that in the 41 days between the commencement of the Pinto recall and the crash on August 10, Ford had made all reasonable efforts to alert Pinto drivers of the danger and the necessity of repair. While the Ulrichs had not in fact received recall notification until February 1979, it could not be said that Ford was reckless in this regard - it was simply a tragic irony that the practical difficulty of reaching 1.5 million customers resulted in the Ulrichs' letter arriving six months too late. After four days, the jury returned a verdict of not guilty, but as noted by William Maakestad "a larger symbolic victory had been won"[62]. Corporations received a

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[61] *supra* n 46, pp. 928-929, fn 52
[62] *supra* n8, p357

clear message from the consumers of America that they could not elevate profit in flagrant disregard of safety without expecting to be called to account in a criminal court.

Since the Pinto case, the trend toward corporate liability for homicide has continued; negligent homicide convictions have been obtained in several states[63], and a reckless homicide indictment was upheld by a New Jersey grand jury against a corporation for the use of a flammable material in an amusement park haunted house[64]. Although the danger posed by the foam padding was known to the company, it installed no fireproofing or even smoke detectors or sprinklers. Eight children died when a youth touched a cigarette lighter to the padding, but the company was acquitted following a controversial trial. A year later, however, the mental element barrier of negligent homicide was broken with the conviction for involuntary manslaughter of Film Recovery Systems in Illinois[65]. The corporation wilfully deceived an immigrant worker about the hazards involved in the cleaning work he was to undertake - even scraping the skull-and-crossbones symbols off vats of cyanide - and failed to provide any of the safety equipment required by law. As well as the corporate manslaughter conviction, three of the five company executives charged were found guilty of murder. Although the Pinto prosecution was ultimately unsuccessful, the seeds it had sown in the psyche of the American public came to fruition here - "*Film Recovery* represents the culmination of a fundamental, symbolic shift in American law that had been catalysed by the Ford Pinto prosecution: corporations fostering or condoning behaviour that had previously been termed 'just bad

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[63] *See*, for example *Granite Constr. Co v. Superior Court*, 149 Cal. App. 3d 465, 470-474, 197 Cal. Rptr. 3, 6-9 (1983); *Commonwealth v. Fortner LP Gas Co.*, 610 S.W. 2d 941, 943 (Ky. Ct. App. 1981); *Commonwealth v. McIlwain School Bus Lines*, 283 Pa. Super. 1, 423 A. 2d 413, 418-419 (Super. Ct. 1980). However, it has been held elsewhere that a corporation is not a person for homicide purposes: *Vaughan & Sons, Inc. v. State*, 649 S.W. 2d 677, 679 (Tex. Ct. App. 1983).

[64] *State v. Six Flags Corp.*, No. 65084 (N.J. Super. Ct. Law Div. Sept. 14, 1984)

[65] *People v. Film Recovery Systems* No.s 85-1853, 85-1854, 85-1952, 85-1953 (Ill. Ct. App. appeal docketed July 1, 1985)

business', and would have led to only a workers' compensation claim, civil suit or regulatory action, could now be labelled as violent criminal offenders"[66].

THE NETHERLANDS

The concept of aggregation has found realisation in the Netherlands. This is perhaps surprising, as it is largely the case that corporate criminal liability is an accepted principle in common-law jurisdictions, but not in continental systems[67]. However, the Netherlands operates under a completely different scheme of liability. Its basis is Article 51 of the Criminal Code, which provides that "[o]ffences can be committed by human beings and by corporations"[68]. Since reformulation of the Code in 1976, this has referred not only to strict liability offences against public welfare, but to the full range of crimes - explanatory memoranda accompanying the reformulation explicitly selected some offences which could be committed by a corporation. These were battery, involuntary manslaughter by the production of unsafe food and drugs, and involuntary manslaughter as a result of a traffic accident caused by a lack of proper maintenance of a corporate vehicle.

It is necessary to examine the law before 1976, however, to gain an understanding of the development of the Netherlands' corporate liability system. Article 51 replaced section 15 of the earlier Economic Offences Act, which had provided for corporate liability for any acts done by a person in the course of his employment, or by others acting in the "sphere of the corporation"[69]. This liability was obviously of considerable scope, and required amendment when the

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[66] *supra* n8, p357
[67] Leigh, L.H. 'The Criminal Liability of Corporations and Other Groups: A Comparative View' (1982) 80 *Michigan Law Review* 1508-1528, 1525
[68] Netherlands Criminal Code, Article 51(1)
[69] Economic Offences Act, s15 (Staatsblad K. 258, June 22, 1950)

law was reformulated to allow corporations to be convicted of crimes which required a mental element, and which carried a much greater social stigma.

In the 1948 case of *Vroom and Dreesmann*[70], a chain of department stores was convicted of the strict liability offence of selling furniture at a price higher than the statutory maximum. The corporate management had forbidden the manager of the department to do so, but this was held to provide no defence - the departmental manager was acting within his authority to sell the goods, and he testified that he had acted to benefit the company. For these reasons, the corporation was held to be liable.

The next significant case in the development of the Dutch corporate liability system may have curiously concerned an unincorporated firm owned by a sole proprietor, but *IJzerdraad*[71] saw a limitation of the ambit of the *Vroom and Dreesmann* criteria. A subordinate manager had deliberately filled in a false export return, and the Superior Court[72] held the defendant liable under the *Vroom and Dreesmann* principle that the manager had acted within the scope of his employment and to benefit the firm. The Supreme Court, however, did not find suitable the application of these criteria to a natural person, and concluded that for the employee's act to be regarded as that of the employer, it must be within the defendant's 'power' to determine whether the employee so acted, and the employee's act must belong to a category of acts 'accepted' by the firm as being in the course of normal business operations. As this had not been established in *IJzerdraad*, the Supreme Court overturned the conviction.

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[70] Hoge Raad, January 27, 1948, N.J. 1948, 197
[71] Hoge Raad, February 23, 1954, N.J. 1954, 378
[72] A regional court of appeal.

IJzerdraad was decided in 1954, but once the conviction of corporations for mens rea offences became possible in 1976, the distinction between liability for sole proprietors and corporations came under criticism. The *Vroom and Dreesmann* approach was not restricted to situations where the defendant was morally culpable, and while this was acceptable in the field of strict liability offences, it was insufficient for cases involving a culpable mental element. The more limited *IJzerdraad* principle was adopted in 1981's *Kabeljauw*[73] case, which saw the prosecution of a corporate shipowner for the contravention of fishing regulations by one of his ships; however, the ship had only been fitted with nets to fish for permitted species and the vessel's captain had been instructed only to do so. There was here no acceptance by the corporation of the actions of the subordinate and the defendant was acquitted.

The Dutch approach to corporate criminal liability resulted in a manslaughter conviction for the first time in the 1987 *Hospital Case*[74]. A hospital trust was charged with gross negligence because of its failure to remove from service outdated anaesthetic equipment; the equipment was not listed as in use, and had not therefore been subject to maintenance or the addition of new safety features. It was used in an operation in which another mistake was also made - tubes were wrongly connected, but the machine to which they were attached lacked up-to-date safety monitoring systems and the error went unnoticed. The patient died as a result. There was no system within the hospital for the supervision of the work of those technicians responsible for such equipment.

The case was heard by a District Court which, being a court of first instance in the Dutch legal system, did not make explicit its reasoning. Field and Jörg[75],

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[73] Hoge Raad, July 1, 1981, N.J. 1982, 80
[74] Hospital Case, Rechtbank Leeuwarden, December 23, 1987, partially recorded at N.J. 1988, 981
[75] Field, Stewart & Jörg, Nico 'Corporate Liability and Manslaughter: should we be going Dutch?' [1991] *Criminal Law Review* 156-171

however, believe that the criteria of 'power' and 'acceptance' first used in relation to a corporate body in *Kabeljauw* were applied here. They also observe that the concepts of power and acceptance "demand an overall judgement on the quality of corporate diligence in establishing, monitoring and enforcing appropriate standards...The management claimed that they could not prevent the unsafe practices because they did not know what was going on. The court's response was that liability was *founded* on the fact that the management was totally unaware of the routine practices of the hospital and they ought to have been aware of them"[76].

It is also important to note that, as evidenced by the *Hospital Case*, the Dutch concepts of power and acceptance "encompass the routinely tolerated as well as the explicitly sanctioned"[77], thereby avoiding the possibility of a company escaping liability by means of a well-drafted set of formal rules which are known by all employees to be ignored in daily practice - "[t]he identity of the central policies of any particular corporation could only be revealed through a careful study of actual corporate behaviour over a period of time. Written statements may be indicative or they may be only window-dressing. Acceptance among the corporate personnel or the higher managerial officers determines the content of the policy recognition"[78].

Aggregation of the fault of several corporate agents is also an accepted principle, and has been since corporations were liable only for strict liability offences - there was judicial acknowledgement in the *ATO*[79] case of 1951 that as long as the acts in question were within the sphere of operation of the business it was not

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[76] *ibid* p165 (emphasis in original)
[77] *ibid* p166
[78] French, P. *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984) p62
[79] Hoge Raad, January 27, 1951, N.J. 1951, 474

necessary to asign those acts to particular individuals, and the same stance was taken in the *Hospital Case* - management failure was the required species of fault, and even if the supervisory lapses and breakdowns in safety procedure could not be pinpointed on any individual, this was irrelevant.

Despite this acceptance of the principle of aggregation (which is founded on the discredited system of derivative liability), the Dutch approach is substantially based on the truly corporate nature of fault in organisations.

AUSTRALIA

The Australian Criminal Code Act of 1995 applies the principles of general criminal responsibility outlined in the Model Criminal Code[80] to corporations[81]. Corporate negligence is determined by an examination of the conduct of the body corporate "when viewed as a whole", and aggregation will suffice as a means of proving the corporation's negligence[82]. One of the Criminal Code Act's radical steps is the abolition of the distinction between subjective mental states, which are dealt with under a section simply entitled 'Fault Elements Other Than Negligence'[83]. A basic standard of responsibility is set, allowing corporations to be convicted of any offence where "the board of directors, a high managerial agent or the corporate culture encourages situtations that lead to the commission of offenses"[84]. The definition of 'high managerial agent' adopted is that of a person whose position in the company may be said to represent the policy of the company. Due diligence in the attempted avoidance of an offence will provide a

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[80] Criminal Law Officers Committee [Code Committee] of the Standing Committee of Attorneys-General, Australia *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility* (1992)
[81] Part 2.5
[82] Criminal Code Act 1995 Part 2.5 s12.4(2)
[83] *ibid* s12.3(1)
[84] Rose, Alan '1995 Criminal Code Act: Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* (1) 129-142, 134

defence where the act or omission is that of a high mangerial agent, but not that of the board of directors. Needless to say, affirmative defences make no sense in the context of liability based on corporate culture.

The concept of corporate culture is the biggest step taken by the Australian legislature. Such culture is defined as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place"[85]. There are several ways in which the existence of a corporate culture which fulfills the criminal criteria can be proved - "[t]he fact that a body corporate authorized or permitted the commission of the offense is proof that a corporate culture existed that directed, encouraged, tolerated, or led to noncompliance with the relevant provision. If a body corporate fails to create and maintain a corporate culture that requires compliance with the relevant provision, this will go to prove that there was a corporate culture directing or encouraging the practice"[86]. Permission from corporate authority for the commission of the same or a similar offence will thus provide evidence of the existence of a criminal corporate culture; so too will the belief, on reasonable grounds, of an employee that a high managerial agent would authorise or permit the commission of the offence. There is a focus on unwritten rules which circumvents the limitations of the identification doctrine - Rose uses the example of employees who know that failure to meet a production schedule will result in dismissal, despite the fact that compliance with safety requirements precludes the possibility of meeting the deadline[87]. As a result, safety guards are removed from equipment. In this situation, the company could be convicted of intentionally breaching safety requirements.

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[85] *supra* n82, s12.3(6)
[86] *supra* n84, p135
[87] *ibid* p136

Colvin complains that "if distinctions between types of subjective fault are worth making for individual responsibility, it is also worth trying to make them for corporate responsibility"[88], and that "the code's scheme for subjective fault ... retains the idea of attributing conduct elements from representatives who are acting within the scope of their employment or authority"[89], but broadly supports the provisions of the Code[90]. The courage to adopt a scheme of liability with such a focus on the corporate nature of fault is admirable; a nettle which should be grasped by those jurisdictions still blindly clinging to derivative forms of liability wholly unsuited to the challenge of modern corporate reality. The problem which remains for all jurisdictions is the effective punishment of corporate persons, and this is the issue dealt with in Chapter Six.

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[88] Colvin, Eric 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* (1) 1-44, 38

[89] *ibid* p43

[90] *ibid* p3 The Code has also found favour with Wells, Celia 'The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] *Criminal Law Review* 545-553, 552-553

CHAPTER SIX: PUNISHMENT OF CORPORATIONS

Throughout this paper, a constant theme has been the necessity of a system of corporate criminal liability which accurately reflects the corporate nature of fault rather than simply mirroring the individual liability of agents and officers of a corporation. This chapter considers the options generally open to a court considering the sentence of a corporation convicted of a crime, and proposes that a considerably wider range of sanctions should be available, particularly in the case of an offence as serious as manslaughter.

THE PROBLEM OF FINANCIAL SANCTIONS

At present, the only option available in sentencing a corporation is a fine. Academic opposition to this state of affairs is energetic; Fisse believes that corporations "tend to regard [fines and monetary sanctions] as an insignificant cost of doing business"[1], and Wells is eager to point out that the assumption that the only available option is a fine "shows a failure of imagination as well as a certain ignorance about corporate penalties in other jurisdictions"[2]. In *Corporations and Criminal Responsibility* she argues for the consideration of "incapacitation in the form of corporate dissolution, disqualification from government contracts and production bans" for severe cases, with "probation, adverse publicity, community service, direct compensation orders, and punitive injunctions"[3] as less drastic measures.

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[1] Fisse, Brent 'Sentencing Options against Corporations' (1990) 1 *Criminal Law Forum* (2) 211-258, 213

[2] Wells, Celia 'Corporations: Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551-566, 552

[3] Wells, Celia *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993) p36. She notes, however, that there remains "an insoluble difficulty with maintaining the existence of the juristic person for the purpose of administering a criminal sanction" (page93). The opportunity for the corporate legal person to dissolve the corporation under company laws is effectively "the

David Bergman refers to the paucity of alternatives as a form of "corporate immunity common to all offenders, whatever their crime", and notes that "[i]n addition, there appears to be no rational method, indeed no method at all, by which courts come to determine the level of the fine"[4]. This stands in stark contrast to the situation concerning individual offenders, for whom there is a wide variety of penalty options which can be used to further the aims of deterrence, retribution and rehabilitation as required. Courts are also furnished with a wealth of information regarding individual offenders - age, education, social circumstances, a probation officer's report - in order that the sentence imposed will be most productive in terms of the aims chosen. Where a corporation is convicted of a regulatory offence, however, the court "remains unaware of the most basic information on the company - its turnover, annual profits, history of relationship with the regulatory agency or its general health and safety record. ... It is therefore impossible for the magistrate or judge to calculate an appropriate and just fine"[5]. To remedy this, Bergman argues for the introduction of a 'pre-sentencing report' for corporate offenders, "outlining the financial situation of the company, a detailed analysis of its safety record, and deficiencies in its system of safety"[6]. This proposal should be strongly supported; any information which can improve the ability of the courts to sentence defendants appropriately can only be of positive value.

It is important to look objectively at both the advantages and disadvantages of the current scheme of sentencing before advocating wholesale change, however,

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legal facilitation of suicide" (p 93); in legal personality, however, this suicide need not be permanent, and the option for the company to reconvene under a different name or with a slightly altered board of directors remains.

[4] Bergman, David 'Corporate Sanctions and Corporate Probation' (1992) *New Law Journal* 1312-1313, 1312

[5] *ibid* p1312

[6] Bergman, David *Deaths At Work: Accidents or Corporate Crime* (London: Workers' Educational Association, 1991)

and so the question arises of what positive points can be made about fines and monetary sanctions. Fisse claims that "especially in the case of less serious offenses, fines are often an expedient and adequate solution"[7], with the notable advantages of "ease of administration, noninterference in the internal affairs of corporations, and contribution toward the costs of enforcement"[8]. There is also the possibility that a fine can serve a restitutive function if part of the penalty is awarded to victims[9], although this should be accomplished by a civil claim for damages. McAdams notes that "to argue that fining a corporation may be ineffective overlooks the moral stigma attached to having been fined as a criminal"[10].

Fines can certainly, if sufficiently great, punish a corporation, and theoretically deter both repeat offences by the corporation in question and similar crimes by others. This is because, as Gary Slapper notes, "In relation to corporate crime it might be thought that the fine was a perfect disposal because, unlike individuals, corporations generally behave rationally. Businesses use cost-benefit analysis as a routine procedure. The trouble is that such calculations are as much based on the likelihood of *being caught* as they are upon the level of the fine if caught and convicted"[11]. The economic calculation which should determine the level of a fine should take several factors into account, including "the economic harm an organization's crimes have caused, a multiplier which reflects the fact that not all offenders are actually caught, and the cost of investigating and prosecuting the organization"[12]. Posner claims that "if the probability of apprehension and

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[7] *supra* n1, p214
[8] *ibid* p249
[9] Miester Jr., Donald J. 'Criminal Liability for Corporations that Kill' (1990) 64 *Tulane Law Review* 919-948, 932
[10] McAdams, John B. 'The Appropriate Sanctions for Corporate Criminal Liability: An Eclectic Alternative' (1977) 46 *Cincinnati Law Review* 989-1000, 996
[11] Slapper, Gary 'Corporate Punishment' (1994) *New Law Journal* 29-30, 29 emphasis in original
[12] Saltzburg, Stephen A. 'The Control of Criminal Conduct in Organisations' (1991) 71 *Boston Law Review* (2) 421-438, 434

conviction were one, ... the optimum fine would be equal to the social costs of illegal activity, and if those costs rose the optimum fine would rise by the same amount"[13]. Therefore if the probability of apprehension and conviction is only, for example, 10%, then the fine must be ten times the social cost of the activity to retain its deterrent effect.

The problem which is then encountered is known as the 'deterrence trap' - if the amount required for effective deterrence simply cannot be paid by the company, then the deterrent value of the fine is hindered. Coffee's explanation of the deterrence trap is that "[t]he maximum meaningful fine that can be levied against any corporate offender is necessarily bounded by its wealth. Logically, a small corporation is no more threatened by a $5 million fine than by a $500,000 fine if both are beyond its ability to pay"[14]. A similar problem is faced when setting fines underpinned by the concept of retribution; an adequate penalty to express public contempt for the crime may be beyond the ability of the defendant to pay, and a 'retribution trap' may thereby result, bringing further unwanted consequences. As Braithwaite observes,

> "[g]iven what we know about how disapproving the community feels toward corporate crime, there may be many situations where the deserved monetary or other punishment bankrupts the company. The community then cuts off its nose to spite its face"[15].

It is important to note early in the discussion that a monetary penalty is an indiscriminate punishment; the penal force of the fine can be deflected by the corporation, resulting in adverse effects experienced by shareholders, creditors, employees and consumers. It is argued that these 'spillover' effects are not out of

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[13] Posner, Richard *Economic Analysis of Law* (Boston and Toronto: Little, Brown and Company, 1986)

[14] Coffee, John '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan Law Review* 386, 390

[15] Braithwaite, John 'Challenging Just Deserts: Punishing White-Collar Criminals' (1982) 73 *Journal of Criminal Law & Criminology* 723, 757

place when they fall to shareholders whose stock decreases in value following a conviction. Investment is a risk, and those who may have profited from the increased profitability of a company during a time when, for example, safety standards were sacrificed to productivity, should have to bear the burden when such behaviour is penalised[16]. It is also put forward that the possibility of damage to the value of stock can result in increased vigilance on the part of the shareholders, and improved accountability within the company. Less easy to justify is the absorption of a financial penalty by increased prices - Miester Jr. notes that corporations may shift "the burden of fines to consumers, which has the perverse effect of making those who are supposed to benefit from sanctioning corporations bear the brunt of the penalty"[17]. A fine of a certain level may also, of course, result in such damage to the corporation that jobs are lost and innocent employees suffer. In short, one of the most significant concerns in the field of corporate punishment is the fact that "[w]hen the corporation catches a cold, someone else sneezes"[18].

The next drawback to monetary penalties is that, by their very nature, they fail to reflect the fact that there is more involved in corporate illegality than the maximisation of profit. Other motivations are present in managerial decision-making; "the urge for power, the desire for prestige, the creative urge, and the need for security"[19] are the examples cited by Fisse of the nonmonetary motivations which financial sanctions cannot directly address. Further, corporate hierarchy results in those personnel some way below the top of the

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[16] Geis claims that the "purchase of corporate stock is always both an investment and a gamble; the gamble is that the corporation will prosper by whatever tactics of management its chosen officers pursue". Geis, 'Deterring Corporate Crime' in *The Consumer and Corporate Accountability* Nader, R. (ed.) (1973) p347

[17] *supra* n9, p933 Spurgeon and Fagan, however, point out that "[a] corporation cannot always pass the cost of fines on to consumers because it will face a competitive disadvantage in the market by raising its prices". 'Criminal Liability for Life-Endangering Conduct' (1981) 72 *Journal of Criminal Law and Criminology* (2) 400-433, 427

[18] *supra* n14, p401

[19] *supra* n1, p219

pyramidal structure having aims and goals which may be unrecognisable as factors tied to an overall corporate profit objective. It is not inconceivable that, for example, safety requirements may be ignored within an organisational sub-unit in order to prevent the closure of the unproductive department in question. This action may go directly against the goal of maximising efficiency in the corporate body as a whole, being motivated instead by a desire to preserve jobs in the sub-unit, but if it is tolerated through negligent supervision, there is corporate fault.

Fisse observes that there are certain crimes for which the individual criminal law will not accept monetary redress as sufficient punishment; these crimes are socially intolerable, and the goals of both deterrence and retribution are served only by incarceration. On the contrary, the fact that similarly unacceptable crimes are punishable only by fines in the corporate context implies that businesses may engage in criminal activity as long as the going rate is paid. This is obviously unacceptable; in the case of manslaughter, for example, the law cannot send a message to the public that "the cash fine serves mainly as a mortality tax that does little to deter corporate killers"[20].

Fisse finds further difficulty with the failure of financial sanctions against corporations to deal with the issue of individual accountability[21]. This is perhaps the weakest point in his dissection of corporate sanctions. As this paper has held throughout, corporate crime is entirely separate from individual crime. If both exist within a corporation, both should be prosecuted, but sanctions imposed for *corporate* fault have no part to play in dealing with individual accountability. Where there is individual criminal responsibility (and perhaps corporate

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[20] *supra* n9, p934
[21] *supra* n1, pp. 221-225

responsibility imputed from this), then the sanctions imposed in relation to the individual responsibility can be expected to address this issue.

Corporate sanctions, then, must be in response to truly corporate crime. For this reason, the next limitation of financial sanctions noted by Fisse is of great importance to the issue of effective corporate punishment. Monetary penalties provide absolutely no guarantee that investigation and reform will take place within a company convicted of an offence[22]. The fulfilment of the rehabilitative intent behind punishment is therefore in the hands of the company convicted; an unsatisfactory position in the case of any punishment. There are alternative sanctions to be discussed below which would empower a court to order remedial action to be taken concerning a company's internal operating procedures and practices, and this is a welcome proposal of the Law Commission in their Report on involuntary manslaughter[23].

Finally, there is a problem caused by the structure of many corporations in that the conviction of a subsidiary corporation will result in a fine based on the financial status of that subsidiary and not the parent company. This could result in corporations abusing the principle of separate corporate identity to minimise their losses through conviction for illegal activity.

These are the major drawbacks to the punishment of corporations by monetary sanctions. It is now proposed to examine some of the alternative sanctions which could be adopted to improve the efficacy of corporate punishment.

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[22] *ibid* pp. 225-226

[23] Law Commission Report No. 237 *Legislating the Criminal Code: Involuntary Manslaughter* (London: HMSO, 1996) para. 8.76

ALTERNATIVES TO FINANCIAL SANCTIONS

There are forms of incapacitative punishment which could be used against corporations, and which, as mentioned above, have been proposed by Wells as possible sanctions for severe cases - "corporate dissolution, disqualification from government contracts and production bans", for example. Both Wells and Fisse agree, however, that the side-effects of such measures could be extremely grave, and could outweigh the harm prevented because of, for example, the loss of jobs.[24]

Perhaps the most appealing alternative sanction is John Coffee's idea of stock dilution:

> "When very severe fines need to be imposed on the corporation, they should be imposed not in cash, but in the securities of the corporation. The convicted corporation should be required to authorize and issue such number of shares to the state's crime victim compensation fund as would have an expected market value equal to the cash fine necessary to deter illegal activity. The fund should then be able to liquidate the securities in whatever manner maximizes its return"[25].

Because the fixed as well as the liquid assets of the corporation are appropriated, the ceiling on fines imposed by the deterrence and retribution traps is circumvented. As well as increasing the amount which can be collected, the public's gain includes "a share in future earnings, as well as ownership rights in the company's plant, equipment, and property investments"[26]. These equity fines have the great advantage of preventing spillover effects experienced by consumers and employees; instead, only shareholders bear the burden of stock dilution, which is one of the risks of investment in a company which operates criminally. The fact that there is no distinction between shareholders who

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[24] *supra* n1, p230; Wells, Celia *op. cit.* at n3, p36
[25] *supra* n14, p413
[26] *supra* n1, p231

merely invest speculatively and those involved in the management of the company is unfortunate, and a reminder of the fact that the spillover effects of punishment may never be fully eliminated; innocents suffer as the incarceration of an individual may, for example, deprive a family of a breadwinner.

Despite the advantages of equity fines, it is important to note that stock dilution may have no effect on corporate internal procedures or the nonfinancial motivations behind corporate decision-making. It is therefore necessary to examine other possible alternative sanctions, perhaps for use in conjunction with stock dilution. While deterrence and retribution are the underlying justifications of any sort of fine, there may exist the possibility of corporate rehabilitation. Probation orders against corporations may be authorised in the United States[27] and, in the form of orders mandating internal remedial action, have been approved by the Law Commission[28]. There could be an order mandating internal discipline, which "would require a corporation to investigate an offence committed on its behalf, undertake appropriate disciplinary proceedings, and return a detailed and satisfactory compliance report to the court issuing the particular order"[29]. Stronger still is the concept of the punitive injunction, which "could be used not only to require a corporate defendant to revamp its internal controls but also to do so in some punitively demanding way"[30] - for example, requiring the involvement of the corporation in the development of improved relevant safety features.

Along with the avoidance of the deterrence and retribution traps, corporate probation orders affect the nonfinancial values in corporate decision-making,

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[27] Sentencing Reform Act 1984
[28] *supra* n23, para. 8.76
[29] Criminal Law and Penal Methods Reform Comm. of South Australia., Fourth Report, *The Substantive Criminal Law* 357-364, 361-2 (1977)
[30] *supra* n1, p237

express society's strong disapproval of corporate crime, force internal corporate reform by their very nature, cause spillover effects only in the loss of prestige by management (who may have had more opportunity than others to avoid the problem in the first place), and avoid the problem of insufficiently punishing a local subsidiary of a larger corporation. Bergman believes that not only can corporate probation be expressly rehabilitative, it can also be used to

> "impose punitive burdens on management which are more difficult to transfer than the economic impact of fines ... [B]y requiring conditions that lower the reputation of the company in a public manner, probation can impose greater punishment and deterrence than mere economic sanctions"[31].

These exact advantages can also be claimed for the use of adverse publicity as a sanction against corporations. In 1970, the United States National Commission on Reform of Federal Criminal Laws made a (never fully implemented) proposal that

> "when a corporation is convicted of an offense, the court may, in addition to or in lieu of imposing other authorized sanctions ... require the organization to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise ..."[32]

In particular, such a sanction strikes at the non-monetary motivations of business decision-making; corporate reputation and prestige is the target, and Fisse claims that a reduction in profit suffered as a result of adverse publicity is more a side-effect than a goal[33].

The importance of goodwill to a corporation causes problems with a final suggested alternative sanction - that of community service. In this case, the

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[31] *supra* n4, 1313
[32] United States National Commission on Reform of Federal Criminal Laws *Study Draft* 405 (1970)
[33] *supra* n1, p241

difficulty is that a convicted criminal may receive a public relations boost from the performance of the punishment awarded. The sanction does, however, avoid the deterrence and retribution traps if applied intelligently; it affects nonfinancial values through the requirement of expending time and effort on projects which may be relevant to the offence committed; this also reflects the social unacceptability of the crime. One special advantage of community service is that "projects reduce spillovers by creating new employment opportunities for persons unemployed or at risk of being laid off"[34].

However, community service does not necessarily tackle the problem which led to the commission of the offence; corporate reform plays no part, and is not promoted by the punishment. There remains the possibility of applying a combination of sanctions, so that a probationary order could demand the reform of internal procedures as well as the performance of community service as a deterrent and restitutive punishment. As Fisse notes, "the anatomy of corporate crime is so diverse that effective sentencing requires a range of sanctions"[35].

The problem of corporate punishment is extremely significant, but as this chapter has shown, attempts to solve it have been scarce. The Law Commission's approval of remedial action orders for convicted corporate killers is to be applauded, but with a potential range of sanctions as diverse as that outlined above, it does not go far enough. Monetary sanctions are woefully inadequate; stock dilution provides a solution for this problem without involving an over-ambitious conceptual leap. With the use of a little imagination, the effectiveness of corporate punishment could be revolutionised through the use of probationary orders, community service or adverse publicity. All that is

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[34] *ibid* p248
[35] *ibid* p249

required is the courage on the part of the legislature to accept the proposals being so loudly proclaimed in academic writing.

CHAPTER SEVEN: LAW COMMISSION REPORT NO. 237

BACKGROUND TO THE REPORT

The Law Commission report *Legislating the Criminal Code: Involuntary Manslaughter*[1] is a progression from the Commission's 1989 report *Criminal Law: A Criminal Code for England and Wales*[2]. The earlier report had as its aim the promotion of accessibility, comprehensibility, consistency and certainty in the criminal law[3]. The Commission saw as its next step the closer examination of individual areas of the criminal law, resulting in the production of a proposed law reform Bill for each area. The eventual goal is the production of a complete Criminal Code for England and Wales[4].

A Consultation Paper emerged in 1994 dealing with the area of involuntary manslaughter[5]. Once the Commission had dealt with the responses[6], it agreed the terms of its report on 13 December 1995. The report which resulted dealt in detail with the issue of corporate manslaughter. The Commission outlined three reasons for this focus[7] - a notable swell in public outrage at perceived corporate fault following widely-reported disasters, the large number of avoidable workplace deaths each year[8] and the curiously low occurrence of corporate manslaughter prosecutions in English law[9].

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[1] Law Commission Report No. 237 (London: HMSO, 1996)
[2] Law Commission Report No. 177 (London: HMSO, 1989)
[3] *supra*, n.1 para. 1.22
[4] This policy is fully stated in *Legislating the Criminal Code: Offences Against the Person and General Principles* Law Commission Report No. 218 (London: HMSO, 1993) paras. 1.1 - 1.4
[5] Law Commission Consultation Paper No 135: *Involuntary Manslaughter* (London: HMSO, 1994)
[6] All those who gave comments are listed in Law Com No 237, Appendix C
[7] *supra*, n.1, para. 1.10
[8] Reported fatalities in accidents at work -
1991-92: 473
1992-93: 452
1993-94: 379

The Commission chose to expose the flaws in the current law of corporate manslaughter by referring to several public inquiries following disasters, where fault had been found in corporate bodies. The report by Mr. Desmond Fennell QC (as he then was) into the fire at King's Cross underground station[10] criticised London Underground for their failure to charge one person with overall responsibility and for not taking precautions against the fire's unpredictability. The platform operator of the Piper Alpha oil platform was held responsible by Lord Cullen's public inquiry[11] for the 167 deaths which occurred there in July 1988, and reporting on the Clapham rail disaster[12], Mr. Anthony Hidden QC (as he then was) described British Rail's working practices as "positively dangerous"[13]. Listing sixteen serious relevant errors[14], the report noted that "the errors go much wider and higher in the organization than merely to remain at the hands of those who were working that day"[15]. British Rail was prosecuted for breaches of the Health and Safety at Work etc. Act 1974, but there appeared to be a reluctance to make the leap from prosecution for regulatory offences to prosecution for manslaughter.

Most significant was the case of the *Herald of Free Enterprise* ferry capsize just outside the harbour at Zeebrugge in March 1987[16]. The collapse of the trial which arose from the disaster seemed to many commentators to prove the inadequacy of the identification principle in bringing justice to cases of alleged

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Health and Safety Executive Annual Report 1993-94. The Law Commission claims that the decrease in fatalities is due largely to the decline of the construction industry (Report No. 237: Part 1, fn 19)

[9]Four in total, only one of which was successful.

[10]*Investigation of the King's Cross Underground fire* (1988) Cm 499

[11]*Public Inquiry into the Piper Alpha Disaster* (1990) Cm 1310

[12]*Investigation of the Clapham Junction Railway Accident* (1989) Cm 820

[13]*ibid*, para. 17.3

[14]*ibid*, para. 17.13

[15]*ibid*, para. 17.11

[16] *Detailed above in the* Introduction

corporate manslaughter[17]. The Law Commission appears to have been especially struck by the words of Eric Colvin:

> "There is a yawning chasm between the moral condemnation of P&O European Ferries by the official inquiry and the legal position of the company ... The structure of the law of criminal corporate liability prevented any inquiry into the aspects of corporate organization that formed the basis of the moral condemnation."[18]

Colvin suggests that, as an alternative to nominalist theories of corporate personality which see the corporation simply as a collectivity of individuals, a scheme of liability should be developed according to realist theories which assert "that corporations have an existence that is, to some extent, independent of the existences of their members"[19]. This is an approach which strikes out in a bold new direction; the opposite direction to such derivative schemes of liability as vicarious liability, the identification principle and aggregation, whereby all culpability is parasitically attached to that of an individual or a number of individuals. And it is an approach which is much favoured by the Law Commission in their proposal of a new offence of corporate killing.

THE LAW COMMISSION'S PROPOSALS

The Law Commission proposes a very significant change in the law of involuntary manslaughter concerning individuals - the replacement of the single overly broad offence with two narrower offences with differing fault elements[20]. This is a welcome move regarding an offence which, it has been noted, "ranges in its gravity from the borders of murder right down to those of accidental death"[21].

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[17] *See, for example,* Burles, David 'The Criminal Liability of Corporations' (1991) *New Law Journal* 609-611; Hilborne, Nick 'Company Liability Review' (1995) *Law Society Gazette* (92/33) 12; Wells, Celia 'Culture, Risk and Criminal Liability' [1993] *Criminal Law Review* 551-566

[18] 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* 1-44, 18

[19] *ibid,* p2

[20] Set out in the Involuntary Homicide Bill included as Appendix A in Law Com No 237

[21] *Walker* (1992) 13 Cr App R (S) 474, 476, *per* Lord Lane CJ

The two proposed new offences are *reckless killing* and *killing by gross carelessness*, and it is the second which the Commission takes as the basis for its attempt to formulate an offence of corporate killing. The offence of killing by gross carelessness is defined as follows:

> "A person who by his conduct causes the death of another is guilty of killing by gross carelessness if -
> (a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position;
> (b) he is capable of appreciating that risk at the material time; and
> (c) either -
>
> (i) his conduct falls far below what can reasonably be expected of him in the circumstances; or
> (ii) he intends by his conduct to cause some injury or is aware or is aware of, and unreasonably takes, the risk that it may do so"[22].

This is not, however, a duplicate of the proposed corporate offence - certain alterations must of course be made to account for the nature of the defendant in a corporate case. The first hurdle the Commission deals with is the requirement that the risk of death or serious injury would have been obvious to a reasonable person in the defendant's position, and that the defendant was capable of appreciating that risk. This is not a legitimate conceptual model for a jury to work with - they cannot be expected to put a hypothetical person in the place of a corporation to determine what should be obvious from that position. The Commission also claims that a corporation does not possess a 'capacity' to appreciate risk in the sense in which that word is used for the gross carelessness offence[23]. For these reasons, the Commission chose to remove the legal requirement of foreseeability in formulating the corporate offence.

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[22]Involuntary Homicide Bill, Cl 2(1)
[23]*supra*, n.1, para. 8.3

In retaining the requirement that the defendant's conduct fall far below what could reasonably be expected in the circumstances, the Commission emphasises that this approach "is based on our view that the offence ought to be one of last resort, available only when all the other sanctions that already exist seem inappropriate or inadequate, and that, therefore, the negligence in question must have been very serious"[24].

The final piece of the offence of gross carelessness which must be considered for adaptation to the corporate context is the requirement of causation. The problem presented by this requirement lies in ascertaining the conduct which can be attributed to the corporation itself. The Commission rejects the suitability of the identification principle for determining truly corporate fault, but recognises the need, as in *Tesco Supermarkets v Nattrass*[25], to make a distinction between organisational decisions and things done at a purely operational level. However, the Commission believes that "the distinction should be drawn in terms of the *kind of conduct* that can incur liability, rather than the *status* of the person or persons responsible for it"[26].

From this starting-point of principle, the Commission looks to the employer's common law duty to provide a safe system of work; an obligation which the Commission breaks into the following main branches: "(1) to provide a safe place of work, including a safe means of access; (2) to employ competent staff: (3) to provide and maintain adequate appliances; and (4) to provide a safe system of work"[27]. The last of these is of particular importance in the present context - the Commission sets up the issue of "whether the conduct in question amounted to a failure to ensure safety *in the management or organisation of the corporation's*

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[24]*ibid*, para. 8.5 (footnotes omitted)
[25][1972] AC 153
[26]*supra*, n.1, para. 8.9 (emphasis in original)
[27]*ibid*, para. 8.12

activities"[28] as a question of fact to be determined by the jury. Stressing that this 'management failure' test for liability does not make the corporation liable automatically for its employees' negligence, the Commission looks to the distinction made in *Wilsons and Clyde Coal Co. Ltd. v English*[29] between "what is permanent or continuous on the one hand and what is merely casual and emerges in the day's work on the other hand"[30].

It is therefore possible under the new proposals for a company to be guilty of an offence when no individual is concurrently liable. It is also notable that the guilt of an individual will not preclude the conviction of the corporation, should the evidence show that the individual act which caused the death was attributable to a management failure of the type described. For the offence of corporate killing, the conduct of one or several individuals is not what is looked for; instead, the prosecution must prove a management failure on the part of the corporation itself. In perhaps the single most radical step of the proposed reform, the Law Commission would therefore introduce a form of corporate criminal liability which is not in any way parasitic on the conduct of individuals.

To accompany this new approach to liability, the Commission proposes welcome new powers enabling courts to order remedial action. Companies convicted of corporate killing could be ordered "to take such steps, within such time, as the order specifies for remedying the failure in question and any matter which appears to the court to have resulted from the failure and been the cause or one of the causes of the death"[31].

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[28] *ibid*, para. 8.19 (emphasis in original)
[29] [1938] AC 57
[30] 1936 SC 883, 904
[31] *supra* n1 para. 8.76 - s5 Draft Involuntary Homicide Bill (Law. Com. No.237 London: HMSO, 1996) p138

In summary, the Commission recommends a special offence of corporate killing, broadly corresponding to the individual offence of killing by gross carelessness. Like the individual offence, it would be necessary for the defendant's conduct to fall far below what could reasonably be expected, but in contrast to the individual crime, the corporate offence would not require that the risk be obvious, or that the defendant be capable of appreciating the risk. A death should be deemed to be caused by a corporation's conduct if caused by a failure, in the way the corporation's activities are managed or organised, to ensure the health and safety of persons employed in or affected by those activities. This management failure may be a cause of a person's death even where the immediate cause is the act or omission of an individual. In the Law Commission's Draft Involuntary Homicide Bill, the offence of corporate killing is stated as follows:

> "4. - (1) A corporation is guilty of corporate killing if -
> (a) a management failure by the corporation is the cause or one of the causes of a person's death; and
> (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
> (2) For the purposes of subsection (1) above -
> a) there is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities; and
> (b) such a failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual"[32].

REACTION TO THE LAW COMMISSION'S PROPOSALS

Academic responses to the Commission's Report have noted the possibility of "more marginalisation of corporate killing rather than less"[33] due to the

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[32] s4 Draft Involuntary Homicide Bill (Law. Com. No.237 London: HMSO, 1996) p137
[33] Wells, Celia 'The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] *Criminal Law Review* 545-553, 553

proposed creation of a special category of offence. The concern is that "the creation of a separate offence could mean that corporate killings would be perceived as different from 'manslaughter' or the new substitute offences. This could lead to a downgrading of the stigma and seriousness of the new offence, and could contribute to its continued marginalisation in terms of enforcement"[34].

Clarkson takes issue with the Commission's finding that corporations cannot possess 'capacity' to appreciate risk in the sense in which that word is used for the individual offence of killing by gross carelessness; he believes simply that the issues for consideration are "whether the risks would have been obvious to a reasonable *corporation* in that position and whether the *corporation* had the capacity to appreciate the risks"[35]. Moreover, he feels that "this latter requirement that the company have capacity to appreciate risks will be of little significance in practice because a company, by definition, will necessarily have this capacity if the risks are obvious"[36].

The belief that corporations cannot possess 'capacity' to appreciate risk "misses the central point that, while corporations are only metaphysical entities, this does not prevent them from being culpability-bearing agents who through their rules, policies and operational procedures can exhibit the requisite degree of *mens rea* and be blamed therefor"[37]. If we are to develop a workable system of corporate liability tailored to the fault of the corporation itself, then the realisation must be made that corporate bodies are more than the sum of their parts; that they are in fact capable of forming policies and achieving objectives which may reflect the individual policies or objectives of none of their executive officers. The nature of

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[34] Clarkson, C.M.V. 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557-572, 569

[35] *ibid* p571

[36] *ibid* Argument based on *Elliot v C (a minor)* (1983) 77 Cr. App. R. 103 that a corporation is in some way mentally backward or unfit to comprehend risks would clearly not be accepted.

[37] *ibid* p571

group decision-making, with its inevitable negotiations and compromises, means that there is a separation between corporate aims and actions and the individuals who make up the company. But, as Clarkson notes, corporations "do not lack cognitive capacity or the ability to engage in practical reasoning, or to exercise control over their actions - the classic hallmarks of responsibility"[38]. Corporations can be deemed to be responsible for their actions under either of the two main theories of responsibility outlined by Clarkson; capacity theory looks to an agent's capacity to reason and to control his actions, and to choose compliance or non-compliance with the law, while character theory demands that those actions which express a person's character are those for which they can be held responsible. Neither of these theories requires the identification of a corporate agent as the embodiment of the company - the application of such a rule of attribution would actually ignore the fact that a corporation "marches on its elephantine way almost indifferent to its succession of riders"[39].

Disaster Action, a group formed by survivors and relatives of those killed in several of the high-profile tragedies which have occurred in the last decade, believes that the proposals do not go far enough - they are especially concerned about two issues; the Report's failure to deal with the lack of police involvement in the investigation of deaths due to corporate activities, and the Commission's avoidance of the problem of the current insufficiency of sentencing options. Disaster Action believes that "[t]he proposed new power of ordering a company to 'remedy the cause of a death' may not be wide enough to ensure that a judge can order wide-ranging structural changes to turn a dangerous company into a safe one"[40]. The group is presently involved in drafting a Private Member's Bill which it intends will "propose a series of new offences of recklessness and

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[38] *ibid* p567
[39] Boulding *The Organizational Revolution* (New York: Harper and Brothers, 1968)
[40] Disaster Action Press Release 'Corporate Killing - Support from Disaster Action for Law Commission Recommendations' 4 March 1996

negligence where death or serious injury occurs; extend the principle of culpability to apply not only to the general law of manslaughter but to all the new offences proposed; and set out a series of new sentencing options, including corporate probation, for companies. It will also aim to impose stringent duties upon company directors concerning safety and create a new regime for the enforcement of safety law"[41].

While the Commission's attention to the problem of corporate liability for causing death is very welcome, concern has been voiced over the possibility of pressure for reform in other types of corporate crime reducing because the newsworthy topic of corporate manslaughter has been dealt with. The fear of marginalisation is therefore not confined to the potential sidelining of corporate killing within the field of homicide, but also reflects the possibility of 'lesser' corporate crimes (for example financial crimes, or offences resulting in injury but not death) being overlooked once the most sensational aspect of corporate crime has received attention. These other corporate crimes will still be subject to the doctrines of identification and vicarious liability, which are no less unsatisfactory in a non-fatal context.

A final complaint registered by Clarkson concerns the power of the court, following a conviction for corporate killing, to order remedial action to be taken by a company in relation to a cause of death. This power is not mentioned should a company be convicted of either of the proposed offences of reckless killing or killing by gross negligence[42]. While Clarkson is probably correct to assume that this is an oversight on the part of the Commission, it should

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[41] Dix, Pamela 'Corporate Responsibility for Public Safety' (Nov/Dec 1995) 5 *Consumer Policy Review* (6) 200-202, 202

[42] *supra* n34, p569, fn88

nevertheless be amended to allow this improvement to sentencing options to apply to all offences of which a corporation may be guilty.

Celia Wells complains of the continued use of the traditional form of *alter ego* liability for corporate prosecution of the 'individual' offences, believing that "[t]he volatility in this area evidenced in the *Meridian* decision points up the problems in addressing corporate liabililty reform through the medium of a new, additional offence, at the expense of a new generic route to liability for all offences"[43]. She also registers disappointment with the Commission's failure to examine reform proposals in other common law jurisdictions[44], and argues for the introduction of an organisational liability mechanism similar to the detailed one found in the 1995 Australian Criminal Code Act[45], which provides that offences of intention, knowledge or recklessness may be proved where the body corporate "expressly, tacitly or impliedly authorised or permitted the commission of the offence"[46]. One of the three ways in which authorisation or permission can be shown is based on examination of the 'corporate culture', which includes the policies, procedures and rules of the company, and also evidence of unwritten rules and attitudes leading to an atmosphere of non-compliance. Wells believes that this approach shows a better appreciation than the Law Commission does of the lesson from corporate killing cases that "corporate defendants are highly motivated and well-placed to exploit the metaphysical gap between 'the company' and its members"[47], and approves the President of the Australian Law Reform Commission's statement that "[t]his approach quite clearly seeks to address the significant criticisms of the 1972 *Tesco* decision, which restricted corporate criminal liability to the conduct or fault of

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[43] *supra* n34, p549 footnotes omitted
[44] Wells, Celia 'The Corporate Manslaughter Proposals: Pragmatism, Paradox and Peninsularity' [1996] *Criminal Law Review* 545-553, 553
[45] *See* Chapter Six *above*
[46] Australian Criminal Code Act 1995 (Cth.), s12.3
[47] *supra* n44, p552

high-level managers or a delegate with full discretion to act independently of in-house instructions, an approach ironically appropriate to the small and medium-sized business, with which large national and multi-national corporations have almost nothing in common"[48].

Despite the criticisms which have arisen, the Law Commission's attention to the topic of corporate killing is of course welcome. In the Conclusion which follows, this paper's support for a system-based theory of corporate liability will be summarised.

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[48] Rose, Alan '1995 Australian Criminal Code Act: Corporate Criminal Provisions' (1995) 6 *Criminal Law Forum* 129-142, 135-136

CONCLUSIONS

The themes underlying this paper are simple. The current system of corporate liability for manslaughter is entirely derivative; conviction of a company is parasitic on the conviction of an individual. Under the *Tesco* principle, only the acts and states of minds of a limited class of 'controlling officers' can be treated as the acts and states of minds of the company - a specialised version of vicarious liability therefore results. Therefore, as Disaster Action notes, "under the present law, there is no difference between the guilt of a senior manager or the company. If the individual is guilty, the company is guilty; if there is insufficient evidence against the individual, then the same goes for the company"[1].

This has major disadvantages; scapegoating is possible, with some commentators fearing that prosecution will only reach a "vice-president responsible for going to jail"[2]. It is least suited to the situations in which it is most likely to be needed, where large companies delegate responsibility and collective knowledge and decision-making are the means by which information is processed. The conviction of a small company where a single director makes effectively all decisions is plausible under the identification doctrine, but if the corporate structure is any more complicated than this, problems develop with the distinction between the company's 'brain' and 'hands'. As Friedman notes, "[i]nstead of coming to grips with the corporate organization, the law proceeded to apply the natural person model to the fictional corporate person ... [As a result, t]he anthropomorphization of the corporation has thoroughly infected legal thought"[3]. The anthropomorphic conception of the corporation is, it is

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[1] Disaster Action *Response to the Law Commission Involuntary Manslaughter Consultation Paper* (1994)
[2] Braithwaite, John *Corporate Crime in the Pharmaceutical Industry* (London: Routledge, 1984) p308
[3] Friedman, Howard M. 'Some Reflections on the Corporation as Criminal Defendant' (1979) 55 *Notre Dame Lawyer* 173-202, 173

submitted, an out-dated conceptual tool which is no longer required for society to understand what is done 'by the corporation'.

Corporations must be seen as genuine persons with duties and responsiblities. Justifications for the punishment of individuals are therefore equally valid for the punishment of corporate persons; problems arise involving the effectiveness and the practical disadvantages of corporate punishment, but these do not negate the sound philosophical reasons for subjecting corporations to the criminal law. They may, by their reason-based nature, be more receptive to the possibility of deterrence and rehabilitation than individuals, and are no less deserving of society's censure and retribution for the harm they cause.

In the place of derivative forms of liability, there must be a new conceptual framework, which must take as its starting-point the common sense understanding that "[i]f it is the company that is culpable, then it is the company that deserves prosecution and punishment"[4]. The concept of aggregation has been considered and rejected because of its basis in vicarious liability. If the imputation of acts and mental states from individuals is unsatisfactory, then it would be inconsistent to accept the imputation of external and mental fault elements from *several* individuals. It is conceptually unsound to hold that, for example, knowledge held by one person coupled with the negligence of another could amount to recklessness on the part of the corporation.

The concept of reactive corporate fault advanced by Fisse and Braithwaite[5] is, it is argued, equally flawed. It takes a factor which goes to mitigation and uses it to determine guilt. A company's failure to react to the commission of an offence

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[4] Clarkson, C.M.V. 'Kicking Corporate Bodies and Damning Their Souls' (1996) 59 *Modern Law Review* 557-572, 562

[5] *See* Fisse, Brent and Braithwaite, John 'Reconstructing Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141 at 1183-1213

in contravention of a probation order mandating remedial action *would* constitute an offence, but the sloppy management which resulted in the original crime is all that must be considered in the punishment of that original crime.

The way forward for corporate criminal liability lies in a system-based approach which properly examines the corporate structure in which the offence was committed and considers whether the offence was a result of, or was authorised or permitted by, the corporate culture evidenced thereby. This idea borrows heavily from the provisions of the Australian Criminal Code Act 1995. For such an approach, the concept of 'due diligence' or 'reasonable precautions' defences becomes, of course, obsolete, as if the company had been duly diligent or taken reasonable precautions, it would not possess a criminal corporate culture. Where this paper diverges from the Australian position is in the adoption of aggregation as a system for determining negligence, and in the abolition of the distinction between subjective mental states; as Colvin notes, these distinctions are highly significant in the individual criminal law, and an attempt must be made to preserve them for the corporate context[6]. Corporate intent is to be found in both express and implied corporate policy, and of our understanding of collective knowledge, Colvin states that "[i]t would be misleading to conceive [of collective knowledge] as simply an aggregation of individual knowledge, and a serious error to describe it as a fiction"[7].

The law of manslaughter laid out in *Adomako*[8] leaves issues of law to the jury, and provides an unsatisfactory test for liability whereby conduct is criminal if the jury considers negligence to be so gross as to justify a criminal conviction. However, the emphasis placed on all the circumstances in which the defendant

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[6]Colvin, Eric 'Corporate Personality and Criminal Liability' (1995) 6 *Criminal Law Forum* (1) 1-44, 38

[7]*ibid* p32

[8] [1994] 3 All ER 79

was placed[9] at the time of the act or omission in question suggests that the judiciary are wary of the possibility of scapegoating. Such considerations, in the context of a corporate defendant, would involve an examination of corporate policies and standard operating procedures. The courts would be forced to examine the corporate culture for signs of negligent operation, in order to determine whether an employee would be found guilty, thereby opening the way for a corporate conviction under the identification principle. The awareness of all the circumstances in which the 'hands' of a corporation can be placed by the decisions of the 'brain' is evident of a movement away from parasitic liability; a recognition that there may be cases in which no individual is sufficiently at fault, but the operation of the corporate enterprise is criminally negligent.

The mention above of implied corporate policy indicates the importance of looking beyond the public image of a company at the unwritten rules and practices which govern its everyday operation. It is never likely that a policy of non-compliance will emerge from scrutiny of public company documents; rather it is something which must be uncovered from evidence of how a corporation is run - were production schedules, for example, too demanding to be met without compromising safety? How receptive was management to suggestions for improvements to procedure? Did superiors ask for the accomplishment of tasks and not require details of the methods used? The prosecution of serious offences must involve an examination of these and similar questions, or the possibility of rehabilitating companies found to be operating unsafely will be lost.

The Law Commission's proposed offence of corporate killing and sanction of court-ordered remedial action shows an encouraging willingness to move

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[9] *ibid* p87

towards a new system of liability which does not require the culpability of an individual corporate officer. The Report does, however, show a reluctance to consider the corporation as a real, if legal, 'person'; there is still a reliance on the idea of the corporation's 'fictional' personality. In keeping with the ability described above to ascribe negligence, knowledge, recklessness and intention to corporations, there is no difficulty in accepting corporations as genuine, not fictional, actors in the modern world. Hence, the denial of corporate 'capacity' to appreciate risk in the Law Commission Report is disappointing, and prevents the corporate offence from mirroring the individual offence of killing by gross carelessness; if this had been the case, the potential marginalisation of the corporate offence could have been limited.

The concept of 'management failure' detailed in the Law Commission Report is highly welcome, and is positive because, like the Australian provisions, its focus is on corporate rather than individual fault. This focus on management failure and the potential outlined in the Law Commission Report for remedial action orders shows that rehabilitation is an important justification underlying the prosecution and punishment of corporations. Similarly, the ability to fine corporations shows that deterrence and retribution both play an important part in the philosophy of corporate punishment, as well as a wish to adequately express the social unacceptability of corporate crime. As explained in this paper, cash fines are not the most effective way of achieving these ends, and should be replaced by the introduction of stock dilution fines. Public censure could also be furthered by the use of adverse publicity, and community service and corporate probation (as approved by the Law Commission) should be added to the list of available sanctions against corporate criminals.

The problem of corporate crime is only likely to increase in an ever more technical society. The language we use to describe such activity is, however,

increasingly the language of blame and censure, and the concept of corporate criminality is no longer a fanciful idea to the layman. A break must be made from the organic development of corporate liability along principles of vicarious liability and its subset, the *alter ego* approach. *Corporate* crime deserves investigation of *corporate* fault, and punishment which can achieve improvement of discovered management failure. Only in this way will the law end its futile attempt to fit a square peg into a round hole.

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